

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HONORABLE LARRY ALAN BURNS, JUDGE PRESIDING

UNITED STATES OF AMERICA,)
)
PLAINTIFF,) CASE NO. 07CR00329-LAB
)
) 07CR00330-LAB
VS.)
) SAN DIEGO, CALIFORNIA
KYLE DUSTIN FOGGO, (1))
BRENT ROGER WILKES, (2)) MAY 14, 2007
)
BRENT ROGER WILKES, (1))
JOHN THOMAS MICHAEL, (2))
)
DEFENDANTS.)
)

REPORTER'S TRANSCRIPT

07CR00329: MOTION HEARING (1, 2)
ARRAIGNMENT (1, 2)

07CR00330: MOTION HEARING (1,2)
ARRAIGNMENT (1,2)

APPEARANCES:

FOR THE GOVERNMENT: KAREN P. HEWITT, U.S. ATTORNEY
BY: PHILLIP L.B. HALPERN, ESQ.
VALERIE CHU, ESQ.
JASON A. FORGE, ESQ.
ASSISTANT U.S. ATTORNEYS
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SAN DIEGO, CA. 92101

20 FOR DEFENDANT FOGGO: AKIN GUMP STRAUSS HAUER & FELD
21 BY: MARK J. MAC DOUGALL, ESQ.
ANDREW J. DOBER, ESQ.
PAUL BUTLER, ESQ.
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24 FOR DEFENDANT WILKES: GERAGOS & GERAGOS
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25

1 CONTINUED APPEARANCES:

2 FOR DEFENDANT MICHAEL:

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-AND-

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10 COURT REPORTER:

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COMPUTER-AIDED TRANSCRIPTION

1 SAN DIEGO, CALIFORNIA - MONDAY, MAY 14, 2007 - 2:00 P.M.

2 THE COURT: CALLING NO. 13 ON THE CALENDAR, 07CR320,
3 UNITED STATES OF AMERICA VERSUS KYLE DUSTIN FOGGO AND BRENT
4 ROGER WILKES FOR MOTION HEARING AND ARRAIGNMENT ON THE
5 SUPERSEDING INDICTMENT;

6 NO. 14, 07CR00330, UNITED STATES OF AMERICA VERSUS
7 BRENT ROGER WILES AND JOHN THOMAS MICHAEL ON FOR MOTION
8 HEARING AND ALSO FOR ARRAIGNMENT ON THE SUPERSEDING
9 INDICTMENT.

10 IF COUNSEL COULD PLEASE STATE THEIR APPEARANCES FOR
11 THE RECORD.

12 MR. GERAGOS: GOOD AFTERNOON, YOUR HONOR.

13 MARK GERAGOS FOR MR. WILKES, WHO'S PRESENT.

14 THE COURT: GOOD AFTERNOON, MR. GERAGOS.

15 MR. GRANGER: RAYMOND GRANGER, YOUR HONOR, GOOD
16 MORNING, HERE WITH MR. MICHAEL.

17 THE COURT: MR. GRANGER, GOOD TO SEE YOU AGAIN.

18 MR. MAC DOUGALL: GOOD AFTERNOON, YOUR HONOR.

19 MARK MAC DOUGALL FOR DEFENDANT KYLE DUSTIN FOGGO.
20 WITH ME IS MY PARTNER PAUL BUTTNER. PRO HOC IS PENDING. AND
21 ANDREW DOBER.

22 THE COURT: GOOD AFTERNOON.

23 MR. FORGE: GOOD AFTERNOON, YOUR HONOR.

24 JASON FORGE, PHIL HALPERN, AND VALERIE CHU FOR THE
25 UNITED STATES.

COMPUTER-AIDED TRANSCRIPTION

1 THE COURT: THE FIRST ORDER OF BUSINESS IS THE
2 SUPERSEDING INDICTMENT.

3 IS THERE A SUPERSEDING INDICTMENT THAT'S BEEN
4 RETURNED IN ONE OR BOTH OF THE CASES?

5 THE CLERK: IN BOTH OF THE CASES.

6 MS. CHU: YES. THE GOVERNMENT MAKES A.

7 MS. CHU: TO REPLACE THE SUPERSEDING INDICTMENT IN
8 07CR0330 WITH ONE THAT CORRECTS A CLERICAL ERROR IN THE ONE
9 THAT WAS ACTUALLY FILED. THERE WAS AN INADVERTENT CARRIAGE
10 RETURN THAT RESULTED IN DIFFERENT NUMBERING BECAUSE OF THE
11 AUTOMATIC FORMATTING. WE'VE CORRECTED THAT AND WOULD REQUEST
12 THAT THAT BE THE ONE THAT'S FILED AND THAT THE DEFENDANTS BE
13 ARRAIGNED UPON.

14 THE COURT: THAT'S SIGNED BY A FOREPERSON OF THE
15 GRAND JURY?

16 MS. CHU: YOUR HONOR, THE ORIGINAL WAS SIGNED. THE
17 SUM AND SUBSTANCE ARE EXACTLY THE SAME. IT SIMPLY CORRECTS A
18 CLERICAL OVERSIGHT. I BELIEVE BOTH COUNSEL HAVE RECEIVED A
19 COPY OF IT. I DON'T BELIEVE THERE'S ANY OBJECTION TO --

20 THE COURT: IT'S SIMPLE ENOUGH, MR. MAC DOUGALL.

21 CAN YOU DO THAT, LEGALLY SPEAKING? THE GRAND JURY
22 DIDN'T PASS ON THIS ONE WITH THE RIGHT NUMBER ON IT.

23 MR. MAC DOUGALL: THIS IS THE FIRST I'VE HEARD OF
24 IT. I WAS HANDED A COPY OF THE INDICTMENT.

25 MR. FORGE: MR. MAC DOUGALL HAS NO DOG IN THIS

COMPUTER-AIDED TRANSCRIPTION

1 FIGHT.

2 MS. CHU: MR. GERAGOS AND MR. --

3 THE COURT: IT USED TO BE EVEN THESE CLERICAL
4 THINGS, I THOUGHT, HAD TO BE RUN BACK IN THE FRONT OF THE
5 GRAND JURY.

6 IF I'M WRONG ABOUT THAT, MR. FORGE --

7 MR. FORGE: WE CAN FILE A BRIEF MEMO. I BELIEVE
8 THERE IS CASE LAW PRETTY CLEARLY ESTABLISHING THE ABILITY OF
9 THE COURT TO ACCEPT A CORRECTED INDICTMENT SUCH AS THIS.

10 THE COURT: I KNOW I'VE INTERLINEATED ON OTHER
11 CHARGING PAPERS ON STIPULATION, BUT THE INDICTMENT REQUIREMENT
12 IS DIFFERENT.

13 MR. GERAGOS: LAST TIME I LITIGATED THIS, WHICH IS
14 MANY YEARS, STATE LAW YOU CAN DO THE METHOD BY WHICH THEY WANT
15 TO PROCEED. FEDERALLY, YOU CANNOT. THAT'S MY LAST TAKE ON
16 THIS ISSUE.

17 THE COURT: LET'S ARRAIGN HIM ON THE ONE THAT WAS
18 RETURNED BY THE GRAND JURY UNDERSTANDING THE GOVERNMENT'S
19 POSITION THAT THERE'S A CLERICAL ERROR.

20 IS THIS JUST MR. WILKES OR MR. WILKES AND
21 MR. MICHAEL?

22 MS. CHU: BOTH DEFENDANTS.

23 MR. GRANGER: WE RAN OUT OF ROOM TO THE RIGHT.
24 WOULD YOU PREFER WE GO OVER THERE?

25 THE COURT: I DON'T WANT YOU TO HAVE TO STAND

1 THROUGH THE WHOLE HEARING. EVERYBODY SPEAKS ENGLISH. PULL
2 THAT CHAIR UP FROM BEHIND THE INTERPRETER'S BENCH.

3 WILL THERE BE ENOUGH CHAIRS, THEN?

4 MR. GRANGER: YES.

5 THE COURT: MR. FRANK, YOU DON'T MIND SITTING UP
6 THERE?

7 MR. FRANK: I WILL SIT WHEREVER YOU WANT ME TO.

8 THE COURT: MR. WILKES AND MR. MICHAEL, IF YOU'LL
9 STAND, THERE'S A SUPERSEDING INDICTMENT IN YOUR CASE.

10 MADAM CLERK.

11 THE CLERK: BRENT MICHAEL WILKES, IS THAT YOUR TRUE
12 NAME?

13 DEFENDANT WILKES: IT IS.

14 THE CLERK: YOU'RE INFORMED THAT A SUPERSEDING
15 INDICTMENT HAS BEEN FILED CHARGING YOU WITH CONSPIRACY, HONEST
16 SERVICES WIRE FRAUD, BRIBERY OF A PUBLIC OFFICIAL,
17 MONEY-LAUNDERING, AIDING AND ABETTING, AND CRIMINAL
18 FORFEITURE.

19 COUNSEL, HAVE YOU RECEIVED A COPY AND WAIVE FURTHER
20 READING?

21 MR. GERAGOS: YES.

22 THE CLERK: JOHN THOMAS MICHAEL, IS THAT YOUR TRUE
23 NAME?

24 DEFENDANT MICHAEL: YES.

25 THE CLERK: YOU'RE INFORMED THAT A SUPERSEDING

1 INDICTMENT HAS BEEN FILED CHARGING YOU WITH CONSPIRACY,
2 MONEY-LAUNDERING, AIDING AND ABETTING, AND CRIMINAL
3 FORFEITURE.

4 COUNSEL, HAVE ALSO RECEIVED A COPY AND DO YOU WAIVE
5 FURTHER READING?

6 MR. GRANGER: YES.

7 THE CLERK: YOU ARE FURTHER INFORMED THAT YOU HAVE
8 THE RIGHT --

9 MR. FORGE: I BELIEVE THERE'S ALSO AN ADDITIONAL
10 CHARGE FOR MR. MICHAEL, OBSTRUCTION OF JUSTICE.

11 THE COURT: YES, THERE WAS. I THINK IT'S THE LAST
12 COUNT IN THE INDICTMENT.

13 THE CLERK: OBSTRUCTION OF JUSTICE.

14 COUNSEL, HAVE YOU RECEIVED A COPY AND DO YOU WAIVE
15 FURTHER READING?

16 MR. GERAGOS: YES.

17 THE CLERK: EACH OF YOU ARE FURTHER INFORMED THAT
18 YOU HAVE THE RIGHT TO BE REPRESENTED BY COUNSEL IN ALL STAGES
19 OF THE PROCEEDINGS BEFORE THE COURT; YOU HAVE THE RIGHT TO
20 REMAIN SILENT; YOU'RE ENTITLED TO A TRIAL BY JURY; YOU HAVE
21 THE RIGHT TO CONFRONT AND CROSS-EXAMINE ANY WITNESSES WHO
22 TESTIFY AGAINST YOU, AND YOU HAVE THE RIGHT TO HAVE WITNESSES
23 SUBPOENAED TO TESTIFY ON YOUR BEHALF.

24 HOW DO YOU PLEAD TO THE SUPERSEDING INDICTMENT.

25 AS TO MR. WILKES?

COMPUTER-AIDED TRANSCRIPTION

1 DEFENDANT WILKES: NOT GUILTY.

2 THE CLERK: AS TO MR. MICHAEL?

3 DEFENDANT MICHAEL: NOT GUILTY.

4 THE COURT: THE COURT ENTERS A NOT GUILTY PLEA ON
5 BEHALF OF BOTH MR. WILKES AND MR. MICHAEL IN THE
6 AFOREMENTIONED INDICTMENT. ALL OTHER CONDITIONS OF BOND AS TO
7 EACH GENTLEMAN REMAIN THE SAME. A NOT GUILTY PLEA IS ENTERED
8 AS TO ALL COUNTS AND FOR ALL PURPOSES.

9 MR. MICHAEL, YOU MAY SIT DOWN.

10 I THINK, MR. WILKES, YOU'RE CHARGED IN THE SECOND
11 SUPERSEDING INDICTMENT AS WELL.

12 MADAM CLERK.

13 MR. FOGGO, IF YOU AND MR. MAC DOUGALL WOULD STAND.

14 THE CLERK: KYLE DUSTIN FOGGO, IS THAT YOUR TRUE
15 NAME?

16 DEFENDANT FOGGO: YES.

17 THE CLERK: BRENT MICHAEL WILKES, IS THAT YOUR TRUE
18 NAME?

19 DEFENDANT WILKES: YES.

20 THE CLERK: EACH OF YOU ARE INFORMED THAT A
21 SUPERSEDING INDICTMENT HAS BEEN FILED CHARGING YOU WITH
22 CONSPIRACY, HONEST SERVICES WIRE FRAUD, MONEY-LAUndering, AND
23 AIDING AND ABETTING.

24 COUNSEL, HAVE YOU EACH RECEIVED A COPY OF THE
25 SUPERSEDING INDICTMENT AND DO YOU WAIVE FURTHER READING?

COMPUTER-AIDED TRANSCRIPTION

1 MR. GERAGOS: ON BEHALF OF MR. WILKES, I HAVE.

2 MR. MAC DOUGALL: ON BEHALF OF MR. FOGGO, YES.

3 THE CLERK: EACH OF YOU ARE FURTHER INFORMED THAT
4 YOU HAVE THE RIGHT TO BE REPRESENTED BY COUNSEL AT ALL STAGES
5 OF THE PROCEEDINGS BEFORE THE COURT; YOU HAVE THE RIGHT TO
6 REMAIN SILENT; YOU'RE ENTITLED TO A TRIAL BY JURY; YOU HAVE
7 THE RIGHT TO CONFRONT AND CROSS-EXAMINE ANY WITNESSES WHO
8 TESTIFY AGAINST YOU, AND YOU HAVE THE RIGHT TO HAVE WITNESSES
9 SUBPOENAED TO TESTIFY ON YOUR BEHALF.

10 HOW DO YOU PLEAD TO THE SUPERSEDING INDICTMENT.

11 AS TO MR. FOGGO?

12 DEFENDANT FOGGO: NOT GUILTY.

13 THE CLERK: AND AS TO MR. WILKES?

14 DEFENDANT WILKES: I REMAIN NOT GUILTY.

15 THE COURT: NOT GUILTY PLEAS ARE ENTERED ON BEHALF
16 OF BOTH DEFENDANTS. THE SAME TERMS AND CONDITIONS PREVIOUSLY
17 SET APPLY TO THIS NEW INDICTMENT. THEY'RE REPRESENTED BY
18 COUNSEL ON IT. AND THE COURT ENTERS A NOT GUILTY PLEA AS TO
19 BOTH GENTLEMEN AS TO ALL CHARGES AND FOR ALL PURPOSES.

20 THANK YOU.

21 I'VE ORGANIZED THIS IN THIS FASHION: MY INTENTION
22 IS TO GO FORWARD FIRST ON THE REQUEST ON BEHALF OF MR. WILKES
23 TO HAVE AN INVESTIGATION OF THE ALLEGED VIOLATION OF RULE 6,
24 THE LEAKING OF GRAND JURY MATERIAL.

25 MR. MAC DOUGALL HAS ALSO JOINED IN THAT, ALTHOUGH

1 THE RELIEF SOUGHT, I THINK, IS SOUGHT BY MR. WILKES, WHICH IS
2 THE COURT CONDUCT AN INVESTIGATION. I'VE READ THE PAPERS ON
3 BOTH SIDES.

4 MR. GERAGOS, I THINK YOU PROBABLY HAVE THE LABORING
5 OAR ON THIS, SO I'M HAPPY TO HEAR FROM YOU.

6 MR. GERAGOS: THIS LAMP OF YOURS IS VERY
7 DISTRACTING.

8 THE COURT: I'VE BEEN TOLD THAT BEFORE. AND I'VE
9 CHANGED THE BULB IN ONE OF THOSE FLUORESCENT ONES, AND IT
10 DOESN'T SEEM TO HELP.

11 MR. GERAGOS: IT'S ACTUALLY WORSE THAN THE LAST
12 TIME. I NORMALLY GET A HEADACHE WHEN I COME TO FEDERAL COURT.

13 THE COURT: TRY NOT TO LOOK AT IT.

14 MR. GERAGOS: I'LL DEFINITELY TRY. I UNDERSTOOD IT
15 WAS A WAY TO CUT THE LAWYERS OFF SO THEY WOULDN'T TALK SO
16 MUCH.

17 I UNDERSTAND THAT AT THIS POINT IT'S THE
18 GOVERNMENT'S POSITION THAT THEY HAVE NOW REFERRED THIS OUT, SO
19 THERE'S AN INVESTIGATION PENDING. BESIDES -- WELL, GIVEN KIND
20 OF THE HISTORY OF THIS AND WHAT I BELIEVE ACTUALLY TRANSPRIED,
21 I DON'T REALLY HAVE ANY PROBLEM WITH THE PARTICULAR ENTITY
22 INVESTIGATING THIS. BECAUSE, AS THE COURT WELL KNOWS, IT'S MY
23 BELIEF THAT WHAT'S TRANSPRIED HERE IS A TURF BATTLE, IF YOU
24 WILL, OR KIND OF A SPITE BATTLE BETWEEN THE U.S. ATTORNEY'S
25 OFFICE HERE IN THIS DISTRICT AND WHAT'S GOING ON IN MAIN

1 JUSTICE OR WHAT'S BEEN GOING ON IN MAIN JUSTICE.

2 SO THAT I DON'T REALLY HAVE A PROBLEM WITH. IN
3 FACT, I ASKED FOR A DISMISSAL OR, IN THE ALTERNATIVE, AN
4 INVESTIGATION TO GET US TO THE POINT WHERE I THINK A DISMISSAL
5 IS WARRANTED.

6 THE COURT LAST TIME, I THINK, ASKED MR. HALPERN TO
7 HANDICAP IT AND SAID, "LOOK, MR. HALPERN, YOU CAN HANDICAP
8 THIS. UNLESS IT'S YOU, I'M NOT GOING TO GO DOWN THE ROAD OF A
9 DISMISSAL." I THINK I INTERJECTED AT THAT POINT OR, IN THE
10 ALTERNATIVE, MS. LAM.

11 IT REMAINS MY BELIEF THAT THESE LEAKS WERE
12 ORCHESTRATED OUT OF THIS U.S. ATTORNEY'S OFFICE. I SEE
13 NOTHING THAT THE GOVERNMENT HAS FILED WHICH DISSUADES ME FROM
14 THAT. IN FACT, THE GOVERNMENT, THEIR POSITION IS,
15 INTERESTINGLY ENOUGH, "WELL, YOU DIDN'T NAME THE REPORTERS"
16 AND BASICALLY SAYING, "WELL, TELL US WHO THE REPORTERS ARE."

17 THAT'S ALMOST SILLY. I'M SUPPOSED TO TELL THEM WHO
18 IT IS THEY LEAKED TO? THEY ARE THE ONES WHO KNOW WHO THEY
19 LEAKED TO. WHEN I SAY THAT, I'M NOT ACCUSING ANYONE
20 SPECIFICALLY AT THE TABLE, ALTHOUGH I DO BELIEVE THAT THE LEAK
21 CAME OUT OF THIS OFFICE.

22 WHAT THEY FAILED TO TALK ABOUT IN THEIR RESPONSE IS
23 I SENT A LETTER ON FEBRUARY 1ST. AND IN THAT LETTER, I TALKED
24 ABOUT TWO SEPARATE INDICTMENTS. I GOT IT WRONG AS TO THE
25 OTHER ONE. I PUT THOMAS BECAUSE WHEN THE INFORMATION WAS

1 GIVEN TO ME, I WAS NOT FAMILIAR WITH THE CO-DEFENDANT IN THIS
2 AT ALL, NOR WAS MY CLIENT. WE ASSUMED IT WAS A DIFFERENT
3 THOMAS, AND THAT'S WHAT I PUT IN THE LETTER.

4 HOW IN THE WORLD COULD I HAVE KNOWN OR ANYBODY BUT
5 THE GOVERNMENT HAVE KNOWN AT THAT POINT THAT THERE WERE TWO
6 SEPARATE INDICTMENTS AND SPECIFICALLY TO A GENTLEMAN NAMED
7 THOMAS.

8 SO CLEARLY, THIS CAME OUT OF OR WAS AN OUTGROWTH OF
9 WHAT I CALL OR WHAT THE U.S. SUPREME COURT HAS CALLED THE
10 PROSECUTION TEAM. AS THIS COURT IS FAMILIAR WITH, THE U.S.
11 SUPREME COURT HAS SAID THAT IT DEEMS EITHER THE AGENTS OR
12 ANYBODY ELSE TO BE PART OF THE TEAM. THERE'S SANCTIONS, GROSS
13 SANCTIONS, ANY TIME THERE'S A VIOLATION OF DUE PROCESS ON
14 BEHALF OF THE TEAM.

15 SO FOR THEM TO SAY, "WELL, IT'S NOT AS BAD" OR "WE
16 DON'T KNOW" OR "MAYBE WE DIDN'T QUITE UNDERSTAND" AND THEY
17 START TO TRY TO PARSE YOUR WORDS LAST TIME AND BASICALLY
18 RETRACT WHAT THEY SAID LAST TIME, I'M AT A LOSS.

19 I BELIEVE, ALSO, THAT ONE OF THEIR POINTS IS "WELL,
20 LOOK, JUDGE, LOOK, YOUR HONOR, THE WALL STREET JOURNAL
21 ARTICLE, MR. WILKES'S PRIOR LAWYER IS THE ONE WHO CONFIRMED
22 CO-CONSPIRATOR NO. 1." WELL, THERE IS NO EVIDENCE TO SUPPORT
23 THAT.

24 IN FACT, IN THE ATTACHMENT ON PAGE 1, IT SAYS THE
25 TWO WHO ALLEGEDLY PLAYED THE BIGGEST ROLE OF CO-CONSPIRATORS 1

1 AND 2 HAD BEEN CONFIRMED BY JUSTICE DEPARTMENT OFFICIALS AND
2 DEFENSE LAWYERS TO BE MR. WILKES AND MR. WADE. THAT'S AT THE
3 BOTTOM OF THE PAGE ON THE FILING BY THE GOVERNMENT -- OR
4 ACTUALLY BY OUR FILING AT THE BOTTOM OF THE PAGE.

5 IT WAS JUSTICE DEPARTMENT OFFICIALS WHO HAVE DONE
6 THIS, AND IT'S A CONCERTED CAMPAIGN TO DESTROY MY CLIENT PRIOR
7 TO GETTING HIM INTO THE COURTROOM.

8 THE PROBLEM WITH THEM NOW SAYING "OKAY. THE WHOLE
9 QUESTION IS MOOT," THE WHOLE QUESTION IS NOT MOOT. IT IS NOT
10 MOOT IN THIS SENSE.

11 THE COURT: I AGREE IT'S NOT MOOT. RULE 6 HAS A
12 SANCTIONS PROVISION, AND THE COURT'S CHARGED WITH DETERMINING
13 WHETHER THERE'S BEEN A VIOLATION. AND, IF SO, WHETHER THE
14 SANCTION'S APPROPRIATE.

15 BUT MY QUESTION TO YOU IS WHY SHOULDN'T I DEFER, AS
16 HAS BEEN DONE IN MANY CASES, TO THE INVESTIGATION BEING
17 CONDUCTED BY INTERNAL AFFAIRS?

18 MR. GERAGOS: THE OIG, I BELIEVE, IS WHAT THEY CALL
19 IT NOW.

20 MR. FORGE: OFFICE OF INSPECTOR GENERAL.

21 THE COURT: USED TO BE OPR.

22 MR. FORGE: ACTUALLY, WHAT HAPPENS PROCEDURALLY IS
23 OIG FARMS IT OUT TO ANOTHER U.S. ATTORNEY'S OFFICE, WHO IN
24 THIS CASE WILL MAKE ALL THE --

25 THE COURT: YOU REPRESENT THAT THAT TOOK PLACE AND

1 THAT A WRITTEN REPORT OF THE FINDINGS WILL BE GENERATED AS A
2 RESULT OF THAT?

3 MR. FORGE: I DON'T KNOW IF A WRITTEN REPORT WILL BE
4 GENERATED. BUT THE PROCEDURE HAS BEEN SET IN MOTION, AND THE
5 MATTER HAS BEEN FARMED OUT TO A U.S. ATTORNEY'S OFFICE.

6 THE COURT: MR. GERAGOS, THAT BEING SO, THE QUESTION
7 I HAVE IS WHY DOESN'T IT MAKE SENSE FOR ME JUST TO DEFER IT TO
8 THE INVESTIGATORS FROM A DIFFERENT OFFICE WHO ARE LOOKING INTO
9 THAT AND REQUIRE THAT A WRITTEN REPORT BE FILED WITH THE COURT
10 SO I CAN TAKE SUCH APPROPRIATE ACTIONS AS IS INDICATED ONCE
11 THAT INVESTIGATION IS COMPLETED?

12 MR. GERAGOS: I AM PERFECTLY FINE WITH IF THE COURT,
13 AS THE LAST LITTLE CAVEAT THAT YOU JUST DID, INSISTS THAT
14 THERE IS A WRITTEN REPORT. I'M OKAY WITH DEFERRING TO THEM
15 BECAUSE, AS I WOULD INDICATE, NUMBER ONE -- THERE'S THE ISSUE
16 OF A DISMISSAL, NUMBER ONE. NUMBER TWO, IF IT TURNS OUT THAT
17 IT'S AGENTS, CLEARLY THAT MATERIAL BECOMES IMPEACHMENT
18 MATERIAL.

19 THE COURT: I AGREE.

20 MR. GERAGOS: IN ADDITION TO THAT -- AND I MENTIONED
21 THIS IN THE LETTER. I DIDN'T GET TO THIS POINT. I'LL
22 FAST-FORWARD TO IT.

23 IF, IN FACT, ITS AGENTS WHO WERE INVOLVED IN THE
24 TAINTING OF SEARCHES, THEN THERE'S FURTHER MOTIONS THAT HAVE
25 TO BE DONE. I WOULD ALSO ENCOURAGE -- I DON'T KNOW IF THE

1 COURT WANTS TO GO THIS FAR, BUT I WOULD ASK THAT SOME KIND OF
2 A WRITTEN REPORT OR PRELIMINARY REPORT BE GIVEN WITHIN SOME
3 CERTAIN AMOUNT OF TIME SO THAT WE DON'T LANGUISH.

4 THE COURT: DO YOU HAVE ANY IDEA -- I ASSUME THAT
5 YOU'RE NOW DIVORCED FROM THE INVESTIGATION THAT'S UNDERWAY.
6 DO YOU HAVE ANY IDEA OF A TIMETABLE? HAS IT ACTUALLY BEEN
7 ASSIGNED TO ANOTHER U.S. ATTORNEY'S OFFICE?

8 MR. FORGE: YES, SIR, IT HAS BEEN ASSIGNED TO A U.S.
9 ATTORNEY'S OFFICE. I DON'T, UNFORTUNATELY, HAVE AN IDEA OF
10 THE TIMETABLE FOR HOW LONG DOES IT TAKE.

11 BUT I WILL POINT OUT THAT OBVIOUSLY NONE OF THIS
12 CHANGES OUR OBLIGATIONS UNDER BRADY, GIGLIO, OR ANY OTHER
13 RULE 16 OBLIGATION. IF ANYTHING ARISES -- AND TYPICALLY WHAT
14 HAPPENS IN THESE SCENARIOS AND WHAT WE WILL ENDEAVOR TO DO IN
15 THIS SITUATION IS PROVIDE THE U.S. ATTORNEY'S OFFICE THAT HAS
16 RECEIVED THIS MATTER WITH PROSECUTION MEMORANDA, THE
17 SUPERSEDING INDICTMENT, AND WHATEVER OTHER BACKUP INFORMATION
18 THEY NEED ON THE CASE, AND ADVISE THAT OFFICE THAT THEY SHOULD
19 CONSULT WITH THE COURT IF THERE ARE ANY ISSUES THAT THEY COME
20 ACROSS THEY THINK TRIGGER ANY DISCOVERY OBLIGATIONS UNDER
21 RULE 16. THAT WAY MR. GERAGOS'S CONCERNS CAN BE MET.

22 THE COURT: THERE'S A TIMELINESS ISSUE, MR. FORGE.
23 AND IT'S MY INTENTION, IF ALL THE MOTIONS ARE DISPOSED OF
24 TODAY, TO SET A TRIAL DATE IN THAT CASE. I THINK MR. GERAGOS
25 IS RIGHT THAT IF IT TURNS OUT THAT IT'S A WITNESS THAT THE

1 GOVERNMENT INTENDS TO CALL, THAT THE WITNESS LEAKED THIS
2 INFORMATION, IT MAY BE INFORMATION THAT OUGHT TO BE GIVEN OVER
3 TO THE DEFENSE IN ADVANCE OF TRIAL. IT'S IMPEACHMENT
4 MATERIAL. IT SEEMS TO ME IT WOULD TEND TO SHOW BIAS, IF
5 NOTHING MORE. I'M A LITTLE CONCERNED ABOUT THE TIMELINESS.

6 ANYTHING ELSE, MR. GERAGOS?

7 MR. GERAGOS: NO.

8 THE COURT: MR. MAC DOUGALL, DO YOU HAVE A POSITION
9 ON THIS? I KNOW YOU'VE ALSO FILED -- YOU DIDN'T ASK FOR
10 SPECIFIC RELIEF.

11 MR. MAC DOUGALL: YES, YOUR HONOR. WE FILED A
12 NOTICE OF JOINDER TODAY, AND WE JOIN IN MR. GERAGOS'S MOTION.
13 OUR CONCERN, AS MR. GERAGOS'S, IS THE COURT RETAIN SUPERVISORY
14 AUTHORITY OVER THIS CASE.

15 THE COURT: I INTEND TO DO THAT.

16 MR. MAC DOUGALL: FOR OUR OFFICE, WE'RE PREPARED TO
17 COOPERATE WITH THE INSPECTOR GENERAL. I HAVE EVIDENCE, AS
18 DOES MR. GERAGOS, OF THE LEAK AND WHERE IT CAME FROM AND WHERE
19 ITS CONTENT WAS.

20 THE COURT: YOU DO?

21 MR. MAC DOUGALL: YES, SIR.

22 THE COURT: ANYTHING ELSE, MR. FORGE, ON THAT POINT?

23 MR. FORGE: NO, YOUR HONOR. I SHOULD ADD I'M
24 ASSUMING -- YOUR HONOR REFERRED TO A WRITTEN REPORT WE FILED
25 IN COURT -- THAT THAT WILL BE FILED UNDER SEAL.

1 THE COURT: IT WILL BE. MR. FOGGO IN HIS PAPERS
2 CITED IN RE: GRAND JURY PROCEEDING BALLAS, B-A-L-L-A-S, AT 62
3 FED. 3D 1175, A 9TH CIRCUIT CASE FROM 1995.

4 THERE, IN RESPONSE TO THE TYPE OF MOTION THAT'S BEEN
5 BROUGHT HERE FOR THE COURT TO INVESTIGATE ALLEGED LEAKS OF
6 GRAND JURY MATERIAL, THE 9TH CIRCUIT FOUND IT WAS SUFFICIENT
7 IF THE COURT DEFERRED TO A GOVERNMENT INDEPENDENT
8 INVESTIGATION OF THE LEAKS PROVIDED THAT THE RESULTING REPORT
9 BE FILED WITH THE DISTRICT COURT UNDER SEAL. THAT'S AT PAGE
10 1179.

11 AS I MENTIONED, RULE 6 AUTHORIZES SANCTIONS.
12 RULE 6(E)(3)(G)(7) CHARGES THE COURT WITH THE RESPONSIBILITY
13 OF MAINTAINING GRAND JURY SECRECY. AS WE ALL KNOW, EVERYONE
14 IS TOLD -- EVERYONE ASSOCIATED WITH THE GRAND JURY PROCESS
15 SAVE WITNESSES, OF COURSE, IS TOLD THAT THESE PROCEEDINGS ARE
16 SECRET.

17 I HAPPEN TO IMPANEL THE GRAND JURIES HERE. I DON'T
18 KNOW, MR. FORGE, IF YOU'VE BEEN PART OF THAT IMPANELMENT
19 PROCESS. I THINK YOU HAVE. BUT ONE OF THE THINGS THAT'S
20 STRESSED IS IT'S A VIOLATION OF LAW FOR GRAND JURORS TO REVEAL
21 ANY OF THE INFORMATION.

22 SO I THINK IT'S IMPORTANT FOR ME IN PARTICULAR, AS A
23 JUDGE CHARGED WITH IMPANELING GRAND JURIES, TO SEE TO IT THAT
24 WE POLICE THAT ADMONITION. I INTEND TO DO THAT IN THIS CASE.

25 SO THE MOTION IS GRANTED TO THIS EXTENT: GIVEN THE

1 GOVERNMENT'S REPRESENTATION THAT THERE IS AN ONGOING
2 INVESTIGATION, THE COURT IS GOING TO ORDER THAT A WRITTEN
3 REPORT OF THE FINDINGS OF THAT INVESTIGATION BE PRESENTED TO
4 ME UNDER SEAL AS SOON AS POSSIBLE.

5 I WOULD LIKE TO TALK TO WHOEVER IS CHARGED WITH THE
6 INVESTIGATION. GIVEN MR. MAC DOUGALL'S REPRESENTATION TODAY
7 THAT HE HAS SOME SPECIFIC INFORMATION, BELIEVES OR THINKS HE
8 KNOWS WHO MAY BE RESPONSIBLE FOR THIS, MY INTEREST IS IN
9 GETTING TO THE HEART OF THE MATTER AS QUICKLY AS POSSIBLE SO
10 THAT THAT INFORMATION MAY BE AVAILABLE TO THE DEFENDANTS FOR
11 THEM TO USE IT AS THEY SEE FIT.

12 SO I'LL NOT AUTHORIZE AN INDEPENDENT INVESTIGATION.
13 I'M GOING TO RELY ON THE ONE THAT'S ALREADY UNDERWAY SUBJECT
14 TO THE PROVISO THAT I GET A COPY OF THAT REPORT.

15 MR. FORGE: YOUR HONOR, THERE'S JUST ONE VERY SLIGHT
16 CLARIFICATION I WANT TO MAKE JUST SO WE'RE CLEAR.

17 THE MATTER'S BEEN REFERRED TO ANOTHER U.S.
18 ATTORNEY'S OFFICE. WHETHER THEY CLASSIFY THAT AS AN
19 INVESTIGATION THAT'S ONGOING RIGHT NOW OR REVIEW FOR
20 INVESTIGATION MAY BE A MATTER OF SEMANTICS WITH THEM. BUT I
21 WILL GET YOU A POINT OF CONTACT AND HAVE THEM --

22 THE COURT: THAT MAKES A DIFFERENCE. IF THERE'S AN
23 ONGOING INVESTIGATION, I'M CONTENT NOT TO DO ANYTHING MORE AT
24 THIS POINT. I DON'T WANT A SIDESHOW AND A TRIAL WITHIN A
25 TRIAL.

1 IF THERE'S NOT AN INVESTIGATION, THEN, AS I SAID
2 BEFORE AND AS YOU ACKNOWLEDGE, THIS IS A SERIOUS BREACH OF THE
3 RULES. AND I THINK GIVEN THE FACT THAT AT LEAST
4 MR. GERAGOS -- AND I'M SURE MR. MAC DOUGALL HAS JOINED IN THE
5 COMMENT -- KNOWS WHO WAS RESPONSIBLE FOR THIS AND IT MAY LEAD
6 TO IMPEACHMENT MATERIAL, I THINK BOTH COUNSEL MIGHT WANT TO
7 KNOW THAT BEFORE ANY TRIAL COMMENCES.

8 IF THERE'S NOT AN ONGOING INVESTIGATION, I WANT TO
9 KNOW THAT RIGHT AWAY BECAUSE THAT MAY CHANGE MY ATTITUDE. I
10 STILL DON'T WANT ANY SIDESHOWS WITH TRIALS WITHIN TRIALS AND
11 INVESTIGATIONS GOING ON. I'M CONTENT AT THIS POINT TO ASSUME
12 THAT THE GOVERNMENT IS CONCERNED ENOUGH ABOUT THIS THAT OIG IS
13 GOING TO CONDUCT AN INVESTIGATION AS YOU'VE BEEN TOLD.

14 MR. FORGE: I'LL CLARIFY THAT.

15 IF THE ANSWER I RECEIVE BACK IS "NO, THERE REALLY
16 ISN'T AN INVESTIGATION. THE MATTER WAS REFERRED TO THAT
17 OFFICE. THAT OFFICE DOESN'T WARRANT AN INVESTIGATION," I WILL
18 CERTAINLY APPRISE THE COURT AND COUNSEL IMMEDIATELY.

19 THE COURT: TELL THEM IF THAT'S THEIR ATTITUDE, I
20 VERY MUCH DISAGREE WITH THE CONCLUSION THAT IT DOESN'T WARRANT
21 AN INVESTIGATION. WE'RE IN A FAIRLY UNIQUE POSTURE HERE WHERE
22 THE GOVERNMENT CONCEDES THAT THERE WAS A VIOLATION OF RULE 6.
23 SOMEBODY DID IT.

24 MR. FORGE: I DO HAVE TO SAY THAT MY CONCESSION AT
25 THE LAST HEARING WAS BASED ON MR. GERAGOS'S REPRESENTATIONS.

1 THE COURT: THE ARTICLES BEAR IT OUT, TOO,
2 MR. FORGE. I DON'T KNOW IF IT GOES AS FAR AS WHAT'S BEEN
3 REPRESENTED ABOUT LINE BY LINE OF INDICTMENTS. BUT I'VE
4 LOOKED AT THE ATTACHED EXHIBITS, AND THERE ARE GOVERNMENT
5 OFFICIALS COMMENTING ON THE CONDITION OF ANONYMITY. AND THE
6 REASON THEY DEMAND THAT, OF COURSE, IS THEY'RE SUBJECT TO
7 BEING HELD IN CONTEMPT FOR DOING EXACTLY WHAT THEY DID.

8 YOU READ THE TEA LEAVES AS I DID; RIGHT?

9 MR. FORGE: AGAIN, YOUR HONOR, THESE ARE SERIOUS
10 ALLEGATIONS. I THINK THAT THE INVESTIGATION SHOULD BE ALLOWED
11 TO TAKE ITS COURSE AND DO SO EXPEDITIOUSLY.

12 THE COURT: I'M GOING TO ASSUME THAT THAT'S
13 UNDERWAY, AND I'M GOING TO REQUIRE THAT IT BE DONE
14 EXPEDITIOUSLY AND THAT I BE GIVEN A REPORT AS SOON AS
15 POSSIBLE. MAYBE NOT THE COMPLETE REPORT. BUT IF THE
16 INVESTIGATION CONCLUDES WHO'S RESPONSIBLE, I WANT TO KNOW THAT
17 SOONER THAN LATER.

18 ANYTHING ELSE ON THAT, MR. GERAGOS OR
19 MR. MAC DOUGALL?

20 MR. MAC DOUGALL: YES, YOUR HONOR. IF I MAY CLARIFY
21 ONE THING.

22 IT WASN'T MY INTENTION TO SUGGEST I KNEW WHO ON THE
23 GOVERNMENT SIDE WAS RESPONSIBLE FOR THE LEAK. WHAT I WAS
24 INDICATING WAS THAT WE HAVE EVIDENCE AS TO WHEN THE LEAK
25 OCCURRED AND TO WHICH REPORTER IT WAS GIVEN AND WHAT THEY WERE

1 SAYING.

2 THE COURT: I MISUNDERSTOOD YOU. SOMEBODY CAN
3 CERTAINLY FOLLOW UP ON THAT.

4 I'M GOING TO JUMP AROUND HERE A BIT.

5 I HAVE READ AND CONSIDERED THE MOTION FOR SEVERANCE
6 AND TRANSFER OF VENUE TO THE EASTERN DISTRICT OF VIRGINIA
7 FILED ON BEHALF OF MR. FOGGO AND THE GOVERNMENT'S RESPONSE
8 THERETO. AND THEN LATE LAST WEEK, I RECEIVED A REPLY AS WELL,
9 WHICH I'VE READ AND CONSIDERED. A PORTION OF THIS HAS BEEN
10 KEPT UNDER SEAL.

11 AND WITHOUT GOING INTO WHAT THE SEALED PART WAS, IT
12 HAD TO DO WITH CONFIDENTIAL MATTERS HAVING TO DO WITH
13 MR. FOGGO AND HIS FAMILY FINANCES. THAT WAS APPROPRIATE TO
14 SEAL AND TO KEEP SEALED.

15 I NEED A CLARIFICATION BEFORE I HEAR FROM
16 MR. MAC DOUGALL ON THIS.

17 MY UNDERSTANDING, MR. GERAGOS, IS THAT MR. WILKES
18 DOESN'T WANT TO BE TRIED IN THE EASTERN DISTRICT OF VIRGINIA.
19 HE'S NOT JOINING IN THIS MOTION TO TRANSFER VENUE THERE.

20 MR. GERAGOS: WE DO NOT WANT TO GO TO THE EASTERN
21 DISTRICT OF VIRGINIA. THAT'S, I GUESS, THE BOTTOM LINE.

22 THE COURT: IT'S EITHER HERE OR THERE, ACCORDING TO
23 THE MOTION.

24 MR. GERAGOS: THAT'S CORRECT.

25 THE COURT: HE WOULD NOT CONSENT TO THE TRANSFER,

1 WOULD NOT WAIVE HIS RIGHT SO AS TO KEEP THE CASE TOGETHER IF
2 THAT WERE WARRANTED?

3 MR. GERAGOS: WELL, IF THE COURT'S INCLINED TO
4 TRANSFER IT --

5 THE COURT: I DON'T KNOW YET. I WANT TO HEAR FROM
6 MR. MAC DOUGALL. BUT I HAD THE IMPRESSION FROM READING THE
7 PAPERS THAT MR. WILKES SAYS, "I'VE LIVED IN SAN DIEGO. I WANT
8 MY TRIAL HERE. I'M HAPPY TO STAND TRIAL HERE. I DON'T WANT
9 TO GO TO THE EASTERN DISTRICT OF VIRGINIA."

10 MR. GERAGOS: THAT'S CORRECT.

11 THE COURT: IS THAT YOUR POSITION, MR. WILKES?

12 DEFENDANT WILKES: YES.

13 THE COURT: MR. MAC DOUGALL, I'M HAPPY TO HEAR FROM
14 YOU ON BEHALF OF MR. FOGGO.

15 MR. MAC DOUGALL: THANK YOU, YOUR HONOR.

16 YOUR HONOR, IN ALL THE BRIEFING THAT WAS DONE ON THE
17 MOTION TO CHANGE VENUE, THERE ARE FIVE WORDS IN RULE 21(B)
18 THAT STICK OUT. I THINK THEY CONTROL EVERYTHING. "IN THE
19 INTEREST OF JUSTICE." AND THOSE WORDS LINK WHAT MR. FOGGO IS
20 ASKING FOR TO THE 6TH AMENDMENT AND TO EVERYTHING THAT IT
21 CONTAINS.

22 THE PLATT FACTORS ARE THERE TO ASSIST THE COURT IN
23 WEIGHING WHERE THE INTERESTS OF JUSTICE LIE. AND, YOUR HONOR,
24 WE BELIEVE ANY FAIR READING OF THOSE FACTORS UNDER THESE
25 CIRCUMSTANCES MILITATE IN FAVOR OF A CHANGE OF VENUE.

1 THIS IS A VIRGINIA CASE, YOUR HONOR. MR. FOGGO AND
2 HIS FAMILY LIVE IN VIRGINIA. THE VICTIM, TO THE EXTENT
3 THERE'S ONE ALLEGED, IS THE CIA HEADQUARTERED IN Langley,
4 VIRGINIA. ALL OF MR. FOGGO'S CHARACTER WITNESSES ARE
5 RESIDENTS IN VIRGINIA. MOST OF THE FACT WITNESSES, AS THE
6 AFFIDAVITS INDICATED, ARE THERE OR AT OVERSEAS LOCATIONS WITH
7 EAST COAST HOMES. OUR EXPERT WITNESS, WHO IS A UNIQUELY
8 QUALIFIED INDIVIDUAL, IS RESIDENT IN WASHINGTON, D.C.

9 EVEN WHEN YOU REVIEW THE SUPERSEDING INDICTMENT
10 RETURNED ON FRIDAY, THE OVERWHELMING BALANCE OF OVERT ACTS
11 ALLEGED ARE IN EITHER WASHINGTON OR VIRGINIA. BY OUR COUNT,
12 THERE ARE A TOTAL OF 30 OVERT ACTS IN VIRGINIA, FIVE IN THE
13 DISTRICT OF COLUMBIA, FIVE IN SAN DIEGO, 14 ARE NEUTRAL IN
14 THAT THEY DON'T SUGGEST A PARTICULAR LOCATION, AND ONE IS
15 OVERSEAS.

16 A TRIAL IN SAN DIEGO IS SOMETHING THAT MR. FOGGO --
17 IT'S A BURDEN THAT MR. FOGGO CAN'T BEAR. AS THE COURT KNOWS
18 FROM SOME OF THE SEALED MATERIAL, HE AND HIS FAMILY LIVE ON A
19 SMALL GOVERNMENT PENSION. WIFE, TWO KIDS, RENTED HOUSE. HE
20 CAN'T AFFORD TO TRAVEL TO PRE-TRIAL HEARINGS. HE TOOK A
21 6:00 A.M. FLIGHT THIS MORNING THROUGH NEW YORK TO BE
22 ARRAIGNED. HE WILL TAKE A RED-EYE BACK TONIGHT TO AVOID THE
23 COST OF A HOTEL.

24 THE COURT: I'M INCLINED TO EXCUSE HIM FROM MOST.
25 BECAUSE THERE WAS AN INDICTMENT THAT HE WAS TO BE ARRAIGNED

1 UPON TODAY, THAT MADE A DIFFERENCE. I WOULDN'T UNNECESSARILY
2 HAVE HIM HERE.

3 MR. FOGGO, IF IT'S YOUR DECISION TO DEFER TO YOUR
4 LAWYERS AT MOTION HEARINGS, PRE-TRIAL HEARINGS, AND LET THEM
5 HANDLE THOSE THINGS, THEN I'M NOT GOING TO UNNECESSARILY DRAG
6 YOU TO SAN DIEGO. BUT YOU NEEDED TO BE ARRAIGNED TODAY ON THE
7 NEW CHARGE RETURNED BY THE GRAND JURY. YOU NEEDED TO
8 PERSONALLY ENTER A PLEA.

9 DEFENDANT FOGGO: THANK YOU, YOUR HONOR.

10 MR. MAC DOUGALL: I APPRECIATE THAT. THE POINT I'M
11 MAKING IS THAT MR. FOGGO'S DEFENSE WILL BE IMPAIRED EVEN WITH
12 THE COURT'S GRANT OF THAT CONCESSION BECAUSE WE CAN ADVISE THE
13 CLIENT AND WE CAN ANTICIPATE WHAT'S GOING TO HAPPEN. BUT OUR
14 ABILITY TO TURN TO A CLIENT AND SAY "WHAT DO YOU THINK?" OR
15 "WHAT ABOUT THAT?" -- AND ONCE WE GET INTO CIPA, THAT'S GOING
16 TO BE A CRITICAL ASPECT OF OUR ABILITY TO DO OUR JOB AND TO
17 DEFEND MR. FOGGO.

18 THE COURT: LET ME ASK YOU ABOUT THAT,
19 MR. MAC DOUGALL.

20 ARE YOU PLANNING TO MAKE SUCH INSPECTION OF ANY
21 CLASSIFIED MATERIAL THAT YOU'LL MAKE AT OR NEAR YOUR OFFICES,
22 OR ARE YOU HAVING TO TRAVEL IN ORDER TO HAVE ACCESS TO THOSE?

23 MR. MAC DOUGALL: THE POSITION THE GOVERNMENT'S
24 TAKEN IS THAT ALL INSPECTIONS OF EVIDENCE ARE TO TAKE PLACE IN
25 SAN DIEGO. AND I CAN WALK FROM MY HOUSE TO CIA HEADQUARTERS

1 ON A NICE DAY. THE IDEA THAT WE HAVE TO COME TO SAN DIEGO --
2 THE GOVERNMENT COULD HAVE HELPED ON THIS. THEY COULD HAVE
3 OFFERED TO SET UP A SKIFF. THERE ARE TWO EMPTY SKIFFS IN THE
4 COURTHOUSE IN ALEXANDRIA, VIRGINIA. THEY HAVEN'T DONE THAT.
5 THAT'S JUST PLACING BURDENS ON A DEFENDANT THAT I THINK
6 RULE 21(B) IS INTENDED TO FOSTER, TO PROTECT.

7 THE COURT: I UNDERSTAND MR. FOGGO IS REPRESENTED BY
8 PRIVATE COUNSEL. I ALSO UNDERSTAND THAT YOU'RE SERVING PRO
9 BONO ON THIS CASE.

10 DO I HAVE ANY AUTHORITY TO USE THE RESOURCES OF THE
11 COURT TO HELP HIM HAVE WITNESSES TRAVEL HERE IN THE EVENT THE
12 MOTION IS DENIED, IN YOUR VIEW?

13 MR. MAC DOUGALL: I THINK YOU DO. I THINK THE
14 COURT, THROUGH ITS SUPERVISORY AUTHORITY, CAN DIRECT THE
15 RELEASE OF RESOURCES AS THE COURT SEES FIT.

16 THE COURT: UNDER 3006(A), I THINK I HAVE THE RIGHT
17 TO MAKE PROVISIONAL EXPENDITURES, INCLUDING APPOINTMENT OF
18 COUNSEL AND TRAVEL AUTHORIZATIONS FOR DEFENSE WITNESSES AND
19 ALL. IF THAT'S ONE OF THE CONCERNS, THAT COULD BE MITIGATED
20 TO A GREAT EXTENT WITH RESPECT TO THESE TEN CHARACTER
21 WITNESSES THAT YOU ENVISION, FOR EXAMPLE.

22 MR. FORGE, WHAT ABOUT MR. MAC DOUGALL'S POINT HERE?
23 WHY ISN'T IT THE CASE THAT THE SECOND SET OF MATERIALS
24 COULDN'T BE SET UP ON A SKIFF SOMEWHERE CLOSE BY SO HE DOESN'T
25 HAVE TO FLY TO SAN DIEGO TO REVIEW THE MATERIALS?

COMPUTER-AIDED TRANSCRIPTION

1 MR. FORGE: MR. HALPERN'S GOING TO ADDRESS THAT.

2 MR. HALPERN: IF I MAY.

3 MR. HALPERN: THIS IS ONE WHERE THE GOVERNMENT DOES
4 NOT NECESSARILY -- TYPICALLY, THE REVIEWING IS DONE IN THE
5 DISTRICT OF THE TRIAL. I BELIEVE THAT'S FOR THE EASE OF THE
6 COURT AND THE EASE OF THE COURT SECURITY OFFICER. THE
7 GOVERNMENT, OF COURSE, SUPPORTS THAT VIEW. NOT UNTIL THIS
8 HEARING WAS THERE ANY REQUEST MADE TO ME, THAT I'M AWARE, THAT
9 WE SET THEM UP IN ALEXANDRIA, VIRGINIA.

10 I THINK YOU SHOULD DISCUSS IT WITH MR. LONDERGAN TO
11 SEE EXACTLY WHAT IS THE MOST APPROPRIATE AVENUE FOR THE COURT
12 SECURITY OFFICER. BUT AS FAR AS WE'RE CONCERNED --

13 THE COURT: MR. LONDERGAN IS BASED IN D.C., TOO.

14 I KNOW YOU FLY AROUND TO DIFFERENT PLACES,
15 MR. LONDERGAN, BUT YOUR HOME BASE IS D.C., IS IT NOT?

16 MR. LONDERGAN: THE JOB WORKS OUT OF D.C. I'VE
17 SPENT SIX WEEKS IN CALIFORNIA ON ANOTHER TRIAL.

18 THE COURT: WHAT ABOUT THE FEASIBILITY OF SETTING UP
19 A SECOND SITE, A SECOND SECURE SITE, FOR THE CONVENIENCE OF
20 COUNSEL SO THAT IN REVIEWING THIS -- AND I ANTICIPATE THAT
21 THERE'S GOING TO BE A LOT OF BACK-AND-FORTH ON THIS CLASSIFIED
22 INFORMATION. COULD WE SET UP A SECOND SITE AND HAVE A SECOND
23 SET OF MATERIALS THAT MIRRORS THE SET HERE IN SAN DIEGO
24 AVAILABLE FOR MR. MAC DOUGALL AND CO-COUNSEL AND MR. FOGGO TO
25 LOOK AT IN D.C.?

COMPUTER-AIDED TRANSCRIPTION

1 MR. LONDERGAN: THERE ARE COMPLICATIONS WHICH ARISE.
2 ONE IS IF THERE ARE SKIFFS AVAILABLE, SMALL SKIFFS AVAILABLE,
3 IN ALEXANDRIA, VIRGINIA, THOSE SKIFFS TYPICALLY ARE HELD WITH
4 THE CASE AND WITH THE VENUE IN ALEXANDRIA, VIRGINIA. THE
5 REVIEW OF THE MATERIAL -- THERE ARE A COUPLE OF CD'S WHICH, AS
6 A COURTESY ON A TEMPORARY BASIS, ARE IN D.C., WHICH ONCE
7 COUNSEL HAS ACHIEVED THIS SECURITY CLEARANCE, WHICH SOME OF
8 THEM HAVE, ARE AVAILABLE.

9 THE COURT: IN D.C.?

10 MR. LONDERGAN: YES, JUST ON A TEMPORARY BASIS.
11 IT'S NOT DEDICATED SPACE. WHAT TYPICALLY HAPPENS IS THERE'S A
12 VOLUMINOUS AMOUNT OF MATERIALS TO BE REVIEWED, WHICH RESULTS
13 IN CLASSIFIED FILES. AND THE HIGHEST SECURITY IS TO HAVE ALL
14 OF THIS DONE IN ONE LOCATION. THERE IS ALREADY A CURRENT
15 ORDER FOR VENUE AND FILING IN SAN DIEGO.

16 THE COURT: ALL RIGHT. GO AHEAD.

17 MR. MAC DOUGALL: YOUR HONOR, ON THE QUESTION OF
18 CLASSIFIED MATERIALS, THE SUPERSEDING INDICTMENT OPENS UP TWO
19 ENTIRELY NEW AREAS. AND THE GOVERNMENT'S CONTENTION HAS BEEN
20 "WELL, WE'RE ABLE TO TRY THIS CASE WITH UNCLASSIFIED OR JUST
21 MATERIAL CLASSIFIED SECRETS." THEY MAY BE ABLE TO PROSECUTE
22 WITH THAT.

23 WHAT WE NEED TO DEFEND OUR CASE IS MUCH BROADER.
24 THE REQUESTS THAT ARE GOING TO BE SUBMITTED WHENEVER THE COURT
25 HEARS THIS CASE ARE GOING TO BE SUBSTANTIAL, AND THEY'RE GOING

1 TO REQUIRE SIGNIFICANT RESEARCH AT LANGLEY, AND THEY'RE GOING
2 TO REQUIRE, IF THE COURT SO RULES, THAT THAT INFORMATION AT
3 LEAST BE AVAILABLE FOR THE COURT TO REVIEW AND FOR DEFENSE
4 COUNSEL.

5 WITH REGARD TO THE CONVENIENCE OF THE COURT AND THE
6 EFFICIENCY, WE'RE VERY SENSITIVE TO THAT. BUT AT THE END OF
7 THE DAY, I DON'T BELIEVE IT'S GOING TO BE PRACTICALLY POSSIBLE
8 TO TRY MR. WILKES AN MR. FOGGO TOGETHER.

9 MR. GERAGOS, AS IS HIS RIGHT, HAS TAKEN THE POSITION
10 THAT HE IS NOT GOING TO UNDERGO A SECURITY BACKGROUND CHECK.
11 IF THAT'S THE CASE -- HE'S CERTAINLY, I THINK, WITHIN HIS
12 RIGHTS TO DO THAT -- I DON'T KNOW HOW YOU PRACTICALLY TRY A
13 CASE WHERE IF I'M CROSS-EXAMINING A WITNESS, I SHOW THE
14 WITNESS A DOCUMENT, IT GOES TO THE BENCH, IT GOES TO THE JURY,
15 MR. WILKES'S COUNSEL CAN'T SEE IT. SO FROM A PRACTICAL
16 STANDPOINT, ONCE WE REACH THE POINT WHERE IT'S TIME FOR TRIAL,
17 I DON'T KNOW HOW WE PROCEED.

18 THE COURT: I WOULDN'T ANTICIPATE WE'D GET INTO THAT
19 SITUATION BECAUSE OF THE SECRET PROCEDURES THAT REQUIRE
20 ADVANCE SCREENING OF THE MATERIAL. I'D THINK ANYTHING AIRED
21 IN OPEN COURT WOULD BE PRE-SCREENED SUCH THAT EVEN IF
22 MR. GERAGOS PERSISTS IN NOT WANTING TO HAVE A BACKGROUND
23 INVESTIGATION, HE'LL BE ABLE TO SEE AND HEAR ANYTHING THAT
24 HAPPENS IN OPEN COURT.

25 THE SANITIZING IS DONE BEFORE THE MATTER HITS THE

COMPUTER-AIDED TRANSCRIPTION

1 LIGHT OF THE DAY IN COURT; RIGHT?

2 MR. MAC DOUGALL: I AGREE. BUT INVARIABLY, THE
3 ISSUE HAS CERTAINLY REACHED BENCH CONFERENCES. MR. GERAGOS,
4 UNDER THOSE CIRCUMSTANCES, WOULD HAVE TO ABSENT HIMSELF FROM
5 THE BENCH OR WAIT OUTSIDE. AGAIN, I DON'T KNOW HOW
6 PRACTICALLY THAT RESULTS IN A TRIAL THAT WOULD NOT HAVE TO BE
7 DONE A SECOND TIME.

8 THE PLATT FACTORS -- AND COURT AFTER COURT HAVE
9 POINTED THIS OUT -- THEY'RE FACT-DRIVEN. THEY DON'T PERMIT
10 BALD ASSERTIONS. AND WE'VE DONE THE BEST WE CAN TO PUT FACTS
11 AND PUT EVIDENCE IN FRONT OF THE COURT THAT WOULD ALLOW THE
12 COURT TO FIND THAT THE CHANGE IN VENUE MOTION IS WELL-FOUNDED.

13 THE GOVERNMENT IN RESPONSE HAS GIVEN US NOTHING.
14 THEY'VE FILED A BRIEF THAT ESSENTIALLY SAID, "WE DON'T AGREE."
15 AND, YOUR HONOR, I THINK UNDER THOSE CIRCUMSTANCES, THE FACTS
16 THAT WE PUT IN FRONT OF THE COURT HAVE TO BE ACCEPTED AS TRUE.
17 THEY HAVEN'T BEEN CHALLENGED, AND THEY HAVEN'T BEEN
18 QUESTIONED. JUST AS THE DEFENSE IS NOT ALLOWED TO MAKE BALD
19 ASSERTIONS, I'D SUGGEST THE GOVERNMENT IS NOT EITHER.

20 THE GOVERNMENT HAS UNLIMITED RESOURCES. THEY HAVE
21 MANY FINE ASSISTANTS BOTH HERE IN SAN DIEGO AND IN ALEXANDRIA
22 AND NORFOLK. AS I TOLD MY COLLEAGUE BEFORE WE CAME IN, THE
23 HARDEST PART OF ARGUING THIS MOTION WOULD BE THAT WE'RE ASKING
24 THIS COURT TO ABSENT ITSELF BECAUSE I DO WANT TO TELL YOU NO
25 MATTER HOW YOU RULE, THAT WE HAVE BEEN TREATED -- WE'RE

COMPUTER-AIDED TRANSCRIPTION

1 STRANGERS HERE. WE'VE BEEN TREATED EXTRAORDINARILY WELL BY
2 ALL YOUR STAFF AND YOURSELF.

3 BUT THE FACT IS THAT MR. FOGGO SPENT 27 YEARS
4 SERVING THIS COUNTRY AND FOUR YEARS WITH A CITY. AND THAT'S
5 THE REASON HE LIVES THE WAY HE LIVES NOW. HE HAS NO
6 RESOURCES. WE'RE DOING THE BEST WE CAN. WE THINK THAT THE
7 CIRCUMSTANCES REQUIRE A CHANGE OF VENUE.

8 THE COURT: I SENSE, MR. MAC DOUGALL, THAT YOU'RE
9 NOT GOING TO LOSE THESE PROSECUTORS EVEN IF I GRANT THE MOTION
10 TO CHANGE VENUE.

11 I HAVE A FEELING THEY'RE GOING TO GO WITH THE CASE,
12 DON'T YOU?

13 MR. MAC DOUGALL: THAT WOULD BE FINE WITH US EITHER
14 WAY.

15 THE COURT: THANK YOU.

16 MR. HALPERN.

17 MR. HALPERN: YOUR HONOR, I DON'T HAVE ANY QUARREL
18 WITH MR. MAC DOUGALL AS FAR AS THE RULE 21(B) STANDARDS AND
19 THE FACT THAT THE COURT HAS TO SEE WHAT'S IN THE INTEREST OF
20 JUSTICE.

21 I ALSO HAVE NO QUARREL WITH THE FACT THAT FROM HIS
22 POINT OF VIEW, IT CLEARLY IS IN HIS CLIENT'S INTEREST TO HAVE
23 IT IN VIRGINIA. BUT THE COURT PUT ITS FINGER EXACTLY ON THE
24 PROBLEM.

25 AS LONG AS WE HAVE TWO DEFENDANTS HERE, WE HAVE TO

COMPUTER-AIDED TRANSCRIPTION

1 LOOK AT THE INTEREST OF EVERY PARTY. THAT'S EXACTLY WHAT THE
2 CASE LAW SUGGESTS. EVERY SUPREME COURT CASE THAT HAS TALKED
3 ABOUT THIS SO FAR AND ALL THE OTHER CASES LOOK AT NOT ONLY THE
4 INTERESTS OF THE DEFENDANT, BUT THE INTERESTS OF ALL THE
5 DEFENDANTS, THE INTERESTS OF THE COURT, AND THE INTERESTS OF
6 THE GOVERNMENT.

7 WHEN YOU WEIGH ALL OF THOSE FACTORS, IT'S CLEAR.
8 AND I THINK THIS IS UNCONTROVERTED THAT THE INTERESTS
9 SUGGESTED SHOULD BE IN SAN DIEGO. WITH DUE DEFERENCE TO
10 MR. MAC DOUGALL AND THE FACT THAT THE GOVERNMENT HASN'T
11 RESPONDED BACK AND JUST BALD ASSERTIONS, THAT'S JUST NOT
12 CORRECT. WE LOOKED AT EXACTLY WHAT THEY FORWARDED TO THE
13 GOVERNMENT.

14 THE FACT OF THE MATTER IS WE DIDN'T PUT IN A 50-PAGE
15 TRANSCRIPT AND 30 OR 40 PAGES OF EXPEDIA PRINTOUTS. WE LOOKED
16 AT EXACTLY WHAT IS BEING CHARGED HERE, WHAT'S IN THE
17 INDICTMENT IN THIS CASE. HE SAYS, LOOKING AT THE OVERT ACTS,
18 THE OVERT ACTS SUPPORT THE FACT THAT THE LOCUS WOULD BE
19 VIRGINIA.

20 AS WE POINTED OUT IN OUR FILING, ALL BUT 13 OF THE
21 44 OVERT ACTS HAVE DIRECT CONNECTION TO SAN DIEGO. WHEN WE
22 LOOK AT THE SUPERSEDED INDICTMENT, WHICH HAS 101 OVERT ACTS,
23 I BELIEVE, YOUR HONOR. OVERWHELMINGLY, PERHAPS 75 OR 80
24 PERCENT OF THOSE ARE, IN FACT, DIRECTLY CENTERED IN SAN DIEGO
25 WITH EITHER WIRES GOING TO OR FROM ELECTRONIC COMMUNICATION OR

COMPUTER-AIDED TRANSCRIPTION

1 THE VERY LOCUS, THE CONSPIRACY, THE MONEY GOING TO SAN DIEGO.

2 AND THAT IS BECAUSE, IN PART AND PARCEL, THE CASE
3 ORIGINATED OUT OF SAN DIEGO. IT ORIGINATED OUT OF AN
4 AGREEMENT BETWEEN MR. WILKES AND FOGGO THAT WOULD BENEFIT BOTH
5 OF THEM IN SAN DIEGO. AND THAT'S INESCAPABLE. INDEED,
6 THROUGH MUCH OF THE CONSPIRACY, MR. FOGGO WASN'T EVEN LOCATED
7 IN VIRGINIA, BUT WAS STATIONED ABROAD.

8 SO WHEN WE LOOK AT ALL OF THE ACTS HE TALKS ABOUT,
9 YOU CAN SEE RIGHT FROM THE INDICTMENT THIS IS A MATTER OF A
10 DECLARATION. IT'S CLEAR FROM THE DISCOVERY THAT HAS BEEN
11 GIVEN OUT AND IT'S CLEAR FROM THE INDICTMENT, THE ACTUAL
12 LANGUAGE, THAT THE CENTER IS IN SAN DIEGO.

13 NOW, AGAIN, THE COURT WAS CONCERNED AND ASKED
14 MR. GERAGOS A QUESTION. IT WAS A VERY IMPORTANT QUESTION
15 BECAUSE IF, IN FACT, THE SEVERANCE IS GRANTED, THAT DOES
16 CHANGE SOMEWHAT THE EQUATION.

17 IN MY OPINION, IT DOESN'T SUGGEST AUTOMATICALLY A
18 DIFFERENT RESULT, BUT IT DOES SAY THAT THE COURT HAS TO
19 MEASURE IT DIFFERENTLY. WE BELIEVE A SEVERANCE IS NOT LIKELY
20 IN THIS CASE. INDEED, THEY DIDN'T EVEN MAKE A FORMAL MOTION
21 FOR SEVERANCE OTHER THAN USING THE 21(B) REQUIREMENT THAT
22 OBVIOUSLY IF THE COURT TRANSFERS VENUE AS TO ONLY ONE
23 DEFENDANT, IT, IN FACT, WORKS AS SEVERANCE. THAT'S CLEARLY
24 RIGHT. WE DON'T QUARREL WITH THAT. WE DON'T QUARREL WITH THE
25 LAW THAT SUGGESTS THAT. IT'S SIMPLY A LOGICAL CONCLUSION.

COMPUTER-AIDED TRANSCRIPTION

1 BUT IF YOU LOOK AT WHETHER MR. FOGGO MERITS A
2 SEVERANCE, WE THINK THE ANSWER TO THAT IS CLEAR, SO CLEAR THEY
3 DIDN'T EVEN BRING A SEPARATE SEVERANCE MOTION, WHICH, IF THEY
4 FEEL IS APPROPRIATE AFTER LOOKING AT THE SUPERSEDING
5 INDICTMENT, THEY CAN BRING. BUT ON ITS FACE, IT DOESN'T RISE
6 TO A SEVERANCE. AS LONG AS WE'RE DEALT THE CARDS WE HAVE NOW,
7 IT'S CLEAR THAT THE APPROPRIATE VENUE FOR THIS CASE SHOULD BE
8 IN SAN DIEGO.

9 THE COURT: THEY TAKE THE POSITION IN THEIR REPLY TO
10 YOUR OPPOSITION THAT A SEVERANCE AS A CONSEQUENCE OF THIS IS
11 NOT A FACTOR FOR ME TO CONSIDER IN EVALUATING PLATT FACTORS IN
12 21(B).

13 DO YOU AGREE WITH THAT?

14 MR. HALPERN: NO, I DON'T AT ALL. IN FACT, THEY
15 SAID IN THEIR BRIEF THAT THE GOVERNMENT CITES NO AUTHORITY TO
16 THE CONTRARY. I DON'T THINK THAT'S TRUE. I THINK WHEN WE
17 LOOK AT THE CORE PRINCIPLES IN UNITED STATES VERSUS NATIONAL
18 CITY LINE, 334 U.S. 573, UNITED STATES VERSUS JOHNSON, 323
19 U.S. 273, WE SEE SUPREME COURT CASES THAT TALK ABOUT BALANCING
20 THE INCONVENIENCE OF ALL THE PARTIES.

21 AND IF YOU WANT TO SEE A CASE RIGHT UP FRONT WE
22 CITED, UNITED STATES VERSUS ZYLSTRA, Z-Y-L-S-T-R-A, 713 AT 2D,
23 1332 AT 1336, THERE WE SEE A CIRCUIT COURT CASE DIRECTLY
24 LOOKING AT COURT RESOURCES AND LOOKING AT WHAT THE HARSHSHIP
25 WOULD BE ON THE COURT IF, IN FACT, A SEVERANCE IS GRANTED AND

COMPUTER-AIDED TRANSCRIPTION

1 WE HAD TO BURDEN THE COURT SYSTEM WITH HAVING TWO SEPARATE
2 TRIALS.

3 I DISAGREE PROFOUNDLY WITH THE SUGGESTION THAT WE
4 DIDN'T CONSIDER THAT, AND I DISAGREE WITH THE INTERPRETATION
5 OF THE LAW, WHICH ALL OF THE CASES LOOK AT IT AND DO A
6 BALANCING OF INCONVENIENCE, WHICH I MIGHT SAY, YOUR HONOR, IS
7 A VERY SELECT VIEW BECAUSE MOST OF THE CASES THAT EVEN REPORT
8 DECISIONS ARE ONES WHERE A COURT FEELS IT'S WORTHWHILE,
9 BECAUSE A SEVERANCE HAS BEEN GRANTED AND A TRANSFER HAS BEEN
10 GIVEN, TO PUBLISH AN OPINION.

11 MOST OF THE TIME, WE DON'T EVEN HAVE PUBLISHED
12 OPINIONS IN THIS AREA. BUT YET EVEN IN THOSE SELECT CASES, WE
13 SAY THE COURT'S LOOKING AT THIS BALANCING OF INCONVENIENCE.

14 THE COURT: THANK YOU.

15 ANYTHING ELSE, MR. MAC DOUGALL?

16 MR. MAC DOUGALL: JUST A COUPLE, YOUR HONOR.

17 LIKE THE GOVERNMENT'S LAWYERS, ALL OF OUR TIME IS
18 IMPORTANT TO US. BUT LIKE THE COURT AND LIKE MANY OF MY
19 COLLEAGUES, I SAT AT THAT TABLE FOR A FEW YEARS, TOO. AND TO
20 QUOTE HYMAN ROTH IN GODFATHER II, "THIS IS THE LIFE WE HAVE
21 CHOSEN." IF WE DECIDE TO DO THIS FOR A LIVING, AS WE ALL DO,
22 THERE ARE BURDENS THAT ARE PLACED UPON US. SOMETIMES
23 TRAVELING IS PART OF THAT BURDEN.

24 I'D ASK THE COURT TO CONSIDER U.S. V. FERGUSON,
25 WHICH IS AN EASTERN DISTRICT OF VIRGINIA CASE, WHERE THE

1 GOVERNMENT ASSERTED THAT VENUE WAS PROPER IN VIRGINIA BECAUSE
2 THE SEC FILING SERVER WAS IN VIRGINIA. AND WHAT JUDGE LEE
3 WROTE WAS AN ELECTRONIC IMPULSE WITHOUT MORE WILL NOT RESULT
4 IN VENUE.

5 AT THAT'S WHAT THE GOVERNMENT'S SAYING. "WELL,
6 THERE ARE E-MAILS. THERE ARE WIRE TRANSFERS INTO THIS
7 DISTRICT. THAT'S ENOUGH." THAT HAS NOTHING TO DO WITH THE
8 GRAVITY OF THE CASE. THE GRAVITY OF THE CASE, THE VICTIM OF
9 THE ALLEGED CASE AND EVERYONE PARTICIPATING IN IT, FOR THE
10 MOST PART, RESIDES IN VIRGINIA. RULE 21(B) ALLOWS THE COURT
11 TO GRANT SEVERANCE WITHOUT A SEPARATE MOTION WHERE A CHANGE OF
12 VENUE IS PROPER.

13 MR. HALPERN: I JUST DISAGREE AND COULDN'T MORE
14 DISAGREE ON THE FACTS. WE'RE NOT TALKING ABOUT SIMPLY
15 ELECTRONIC IMPULSES HERE. IF YOU LOOK AT THE ADDITIONAL OVERT
16 ACTS THAT ARE ADDED, THEY SHOW A SEPARATE SCHEME WHERE
17 MR. FOGGO AND MR. WILKES ATTEMPTED TO GET A CONTRACT WORTH
18 OVER \$100 MILLION FROM THE GOVERNMENT THAT'S PART AND PARCEL
19 OF THAT ENTIRE SCHEME, WAS CENTERED IN SAN DIEGO, AND BEGAN IN
20 DECEMBER OF 2004. AND 90 PERCENT OF IT, ALL BUT FOUR WEEKS OF
21 IT, TOOK PLACE IN THIS DISTRICT.

22 THIS IS THE VERY DISTRICT MR. FOGGO WANTED TO RETURN
23 TO WHEN HE LEFT THE CIA. THE EVIDENCE IN THE INDICTMENT AND
24 IN TRIAL WILL SHOW THAT HE HAD AN OFFICE RESERVED HERE. IT'S
25 FAR MORE THAN SIMPLY AN ELECTRONIC IMPULSE.

COMPUTER-AIDED TRANSCRIPTION

1 THE COURT: BOTH PARTIES HAVE CITED THE COURT TO THE
2 PLATT CASE, 376 U.S. 43. I'VE CONSIDERED THE PLATT FACTORS
3 EXTENSIVELY LAST WEEK AND OVER THE WEEKEND REREADING THEM AND
4 RECONSIDERING THE FACTORS IN LIGHT OF THE PROFFERS IN THE
5 DECLARATIONS I'VE RECEIVED.

6 I FIND THE PLATT FACTORS TO BE FAIRLY CLOSELY
7 BALANCED. IT'S TRUE MR. FOGGO IS LOCATED ON THE EAST COAST,
8 THAT A TRIAL IN THE EASTERN DISTRICT OF VIRGINIA WOULD
9 CERTAINLY BE MORE CONVENIENT FOR HIM.

10 I FIND, GIVEN THE INFORMATION THAT WAS SUBMITTED TO
11 ME UNDER SEAL, THAT HE COULD BETTER AFFORD TO DEFEND HIMSELF
12 AND PUT IN THE TIME WERE THE VENUE OF THE CASE IN THE EASTERN
13 DISTRICT OF VIRGINIA.

14 ON THE NEXT ISSUE, THE LOCATION OF POSSIBLE
15 WITNESSES, THIS IS EVENLY BALANCED. WHILE MR. FOGGO'S
16 IDENTIFIED WITNESSES THAT WOULD HAVE TO TRAVEL TO THE WEST
17 COAST, SPECIFICALLY CHARACTER WITNESSES WHO HAVE BEEN
18 IDENTIFIED, THE BULK OF THE GOVERNMENT'S WITNESSES ARE HERE.
19 THEY'RE PEOPLE THAT HAVE INVESTIGATED THE CASE WHILE IT WAS
20 BEING LOOKED AT HERE. THEY'RE AGENTS, LAW ENFORCEMENT. THEY
21 MAY WELL BE ALSO PEOPLE WITH FINANCIAL INSTITUTIONS, PEOPLE
22 WHO HAVE TO LAY THE FOUNDATION FOR SOME OF THE ALLEGATIONS OR
23 THE PHYSICAL EVIDENCE THAT WAS IMPLICATED BY THE ALLEGATIONS
24 IN THE OVERT ACT.

25 AGAIN, WITH RESPECT TO LOCATION OF THE EVENTS LIKELY

COMPUTER-AIDED TRANSCRIPTION

1 TO BE AN ISSUE, I FIND THIS EVENLY BALANCED. IT'S AN EASY
2 THING TO COUNT UP NUMBERS ON OVERT ACTS ON EITHER SIDE. I
3 LOOK BEYOND THAT NOT JUST QUANTITATIVELY COUNTING UP THE OVERT
4 ACTS IN SAN DIEGO VIS-A-VIS IN WASHINGTON, D.C. I LOOK
5 QUALITATIVELY ALSO AT WHAT I THOUGHT WAS THE GIST OF THE
6 INDICTMENT AND THE GIST OF THE ACCUSATIONS AGAINST MR. FOGGO.
7 I FIND THOSE TO BE IN BALANCE.

8 MANY OF THE THINGS THAT ARE AT THE HEART OF THE
9 GOVERNMENT'S CASE ARE ALLEGED TO HAVE OCCURRED HERE IN
10 SAN DIEGO. IF ANYTHING, THAT FACTOR TILTS SLIGHTLY IN FAVOR
11 OF MAINTAINING THE CASE HERE.

12 LOCATION OF THE DOCUMENTS AND RECORDS, THIS FAVORS
13 MR. FOGGO TO BE SURE AT THIS POINT.

14 MR. LONDERGAN, MY HOPE IS THAT WITH RESPECT TO ALL
15 BUT PERHAPS THE MOST CLASSIFIED TOP SECRET MATERIALS, THAT A
16 SECOND SET OF MATERIALS COULD BE GENERATED AND MAINTAINED AT A
17 SKIFF SO IT'S CONVENIENT FOR MR. FOGGO AND HIS COUNSEL TO
18 REVIEW.

19 I KNOW THAT THAT MAYBE HAS NOT BEEN DONE IN OTHER
20 CASES. I KNOW IT'S BEING DONE ON A TEMPORARY BASIS NOW. BUT
21 I'M INFORMED BY MR. MAC DOUGALL THAT THERE IS SKIFF SPACE
22 AVAILABLE. I KNOW THAT THAT'S EARMARKED OR DESIGNATED FOR
23 CASES ARISING IN THE EASTERN DISTRICT OF VIRGINIA. AND THERE
24 WILL BE A LOT OF THEM, I SUSPECT.

25 BUT UNTIL SUCH TIME THAT THE SPACE IS SPOKEN FOR, I

COMPUTER-AIDED TRANSCRIPTION

1 DON'T UNDERSTAND WHY YOU COULDN'T USE IT SUBJECT TO THE CAVEAT
2 THAT TRULY CLASSIFIED STUFF THAT THEY DON'T WANT TO MAKE TWO
3 COPIES OF CAN BE HERE. WITH RESPECT TO THAT, THEY'LL JUST
4 HAVE TO TRAVEL HERE. SO I THINK SOME ACCOMMODATION CAN BE
5 MADE THERE.

6 DISRUPTION OF THE DEFENDANT'S BUSINESS UNLESS THE
7 CASE IS TRANSFERRED OR HIS ABILITY TO SUPPORT HIMSELF AND HIS
8 FAMILY, MY INTENTION IS TO EXCUSE MR. FOGGO FROM ALL OTHER
9 MATTERS EXCEPTING THE TRIAL. IN PARTICULAR, HE CAN BE
10 AVAILABLE BY TELEPHONIC CONFERENCE. I ENVISION THAT THERE
11 WILL BE PROCEEDINGS WHERE I AM IN CAMERA WITH MR. MAC DOUGALL
12 AND OTHER COUNSEL FOR MR. FOGGO WHERE WE GO OVER CIPA. I HAVE
13 A COURT REPORTER WHO HAS UNDERGONE TOP SECRET CLEARANCE. SHE
14 CAN BE PARTY TO THOSE PROCEEDINGS IN CHAMBERS. SHE CAN TAKE
15 DOWN EVERYTHING THAT'S SAID. AND MR. FOGGO WILL BE AVAILABLE
16 BY TELEPHONE. SO AGAIN, I FIND THAT THAT FACTOR CAN BE
17 MITIGATED.

18 NOW, THE QUESTION MIGHT BE "WELL, WAIT A MINUTE.
19 WHY ARE YOU LOOKING FOR WAYS TO KEEP IT HERE?" THE REASON IS
20 I AGREE WITH MR. HALPERN'S POINTS. SEVERAL OF THESE FACTORS
21 IMPLICATE THE INTEREST OF JUSTICE OVERALL. LOOK AT THE
22 COURT'S DOCKET, FOR EXAMPLE, VERSUS THE EASTERN DISTRICT OF
23 VIRGINIA. RELATIVE ACCESSIBILITY OF PLACE AND TRIAL, LOCATION
24 OF COUNSEL, THEY'RE ALL UNDER THE RUBRIC OF INTEREST OF
25 JUSTICE.

COMPUTER-AIDED TRANSCRIPTION

1 WHAT STRIKES ME AS POTENTIALLY A TERRIBLE WASTE
2 WOULD BE TO TRY THIS CASE TWICE ON BOTH COASTS, ONCE ON THE
3 EAST COAST WITH THE SAME EVIDENCE AND ONCE ON THE WEST COAST.
4 I WOULD FEEL DIFFERENTLY ABOUT THIS, MR. MAC DOUGALL, IF
5 MR. WILKES HAD JOINED IN THE MOTION AND SAID "NOTWITHSTANDING
6 THAT I LIVE HERE IN SAN DIEGO AND I WANT A JURY FROM WHERE I
7 LIVE TO TRY MY CASE, I'M WILLING TO GO THERE," I WOULD FEEL
8 DIFFERENTLY ABOUT IT THEN. THEN I THINK THE BALANCE OF
9 EQUITIES WOULD TILT TOWARDS MOVING THE CASE THERE.

10 BUT THAT'S NOT HIS POSITION. AND THE EFFECT OF
11 GRANTING THIS MOTION IS, IN EFFECT, A GRANT OF SEVERANCE AND
12 TO REQUIRE THE GOVERNMENT TO TRY THIS CASE TWICE ON TWO
13 DIFFERENT COASTS WITH WHAT I ASSUME WILL BE ESSENTIALLY THE
14 SAME EVIDENCE. AND I THINK THAT RAISES LOGISTICAL CONCERN IN
15 ITS OWN RIGHT. WHICH TRIAL GOES FIRST, MR. WILKES OR
16 MR. FOGGO? IF I START -- I ANTICIPATE THAT IF WE GO FIRST
17 WITH MR. WILKES HERE, WERE I TO GO DOWN THAT PATH, THAT YOU
18 WOULD WANT TO BE HERE FOR MOST OF THAT TRIAL ANYWAY. AND
19 COUNSEL WOULD. MAYBE MR. FOGGO WOULD WANT TO BE HERE. BUT
20 CERTAINLY YOU WOULD. AS A MATTER OF PREPARATION, YOU'D WANT
21 TO HEAR HOW THESE WITNESSES ARE COMING ACROSS AND MAKE YOUR
22 OWN NOTES.

23 SO I DON'T KNOW THAT I CAN AVOID THE VERY CONCERN
24 THAT SEEKS TO BE AT THE HEART OF THE 21(B) MOTION, WHICH IS TO
25 TRY TO SAVE SOME MONEY, SAVE SOME RESOURCES, AND MAKE IT MORE

1 CONVENIENT FOR HIM. BECAUSE IN THE END, THERE WOULD STILL BE
2 A TRIAL HERE.

3 EXPENSE TO THE PARTIES, I'VE LOOKED AGAIN AT
4 3006(A). I THINK THAT CAN BE MITIGATED AS WELL. HE HASN'T
5 FILLED OUT A FINANCIAL DECLARATION UNDER OATH WITH ME. I HAVE
6 DECLARATIONS THAT ATTEST TO HIS FINANCIAL CONDITION. IF YOU
7 WANT TO MAKE AN EX PARTE APPLICATION AND FILL OUT A FINANCIAL
8 DECLARATION UNDER OATH, I'LL CONSIDER AT LEAST FUNDING THE
9 TRANSPORTATION OF WITNESSES HERE FOR THE DEFENSE UNDER
10 3006(A). I MAKE NO HARD-AND-FAST PROMISE AT THIS POINT, BUT
11 I'LL LOOK AT THE FINANCIAL INFORMATION. IF IT SEEMS TO ME
12 THAT IT'S WARRANTED, THEN THE COURT CAN MITIGATE THE COST OF
13 THAT EXPENSE BEING BORNE BY MR. FOGGO OR INDEED BY THE
14 WITNESSES THEMSELVES. SO I DO FIND THAT THERE'S A WORK-AROUND
15 FOR THAT FACTOR.

16 THE LOCATION OF COUNSEL, YOU SAID IT BEST. THIS IS
17 THE JOB THAT YOU'VE CHOSEN, MR. MAC DOUGALL. I'M NOT GOING TO
18 PIN YOU DOWN, BUT I SAW YOU AT LEAST NODDING UNDERSTANDINGLY
19 WHEN I SAID AS A GOOD TRIAL LAWYER, YOU'RE PROBABLY GOING TO
20 WANT TO BE HERE. THIS CASE IS LIKELY TO GO BEFORE THE OTHER
21 ONE WERE I TO GRANT A SEVERANCE, AND YOU'D BE HERE ANYWAY.
22 YOU'D BE HERE TAKING NOTES AND WATCHING AND PREPARING FOR
23 MR. FOGGO'S DEFENSE IN A SEPARATE TRIAL.

24 I HAVE THE STATISTICS ON THE DOCKET CONDITIONS OF
25 EACH DISTRICT INVOLVED. THEY ARE VERY, VERY CLOSE. AT THE

1 END OF THE DAY, I JUST CAN'T FIND THAT IT'S IN THE INTEREST OF
2 JUSTICE TO SEVER THIS CASE AND TO HAVE SEPARATE TRIALS OF THE
3 SAME MATTER ON ALTERNATIVE COASTS, EAST AND WEST. SO SUBJECT
4 TO THE MITIGATIONS THAT I'VE SUGGESTED AND INTEND TO TAKE, THE
5 MOTION IS DENIED. THE TRIAL WILL PROCEED HERE.

6 IF YOU WANT TO FILE AN AFFIDAVIT UNDER SEAL, GIVE ME
7 A FINANCIAL AFFIDAVIT, THEN I'LL BEGIN CONSIDERING THAT. IF
8 MR. FOGGO WANTS TO WAIVE HIS PRESENCE IN ADDITIONAL HEARINGS,
9 THEN ARRANGEMENTS FOR CIPA REVIEW CAN BE DONE TELEPHONICALLY
10 WITH HIM. HE MAY HAVE TO HAVE SOME SPECIAL PLACE TO GET ON
11 THE PHONE TO TALK ABOUT THIS. I DON'T FORECLOSE THAT. BUT AT
12 LEAST HE WOULDN'T HAVE TO FLY OUT AT 6:00 IN THE MORNING TO BE
13 HERE FOR A HEARING.

14 WITH THOSE PROVISOS, THE MOTION IS DENIED.

15 MR. MAC DOUGALL: THANK YOU, YOUR HONOR.

16 THE COURT: ONE OTHER THING. I NEGLECTED TO MENTION
17 THIS, BUT THIS ALSO INFORMED MY THINKING.

18 MR. HALPERN POINTS OUT THERE WAS NOT AN ALTERNATIVE
19 BASIS FOR SEVERANCE ARGUED IN THIS CASE. I DID CONSIDER THAT,
20 TOO. IF THERE'S SOME OTHER REASON THAT THIS CASE WOULD
21 OTHERWISE BE SEVERED, THAT WOULD MAKE IT EASY. BUT I HAVEN'T
22 SEEN IT YET. I'M NOT FORECLOSING THAT THERE MIGHT BE A MOTION
23 FOR SEVERANCE AT SOME POINT. THAT WOULD CHANGE THE EQUATION,
24 CERTAINLY. IF MR. FOGGO'S CASE WERE TO BE SEVERED FROM
25 MR. WILKES, THEN I WOULD RECONSIDER IT. SO LET ME MODIFY MY

1 RULING. IT'S DENIED WITHOUT PREJUDICE.

2 MR. GERAGOS, WE'RE GOING TO TURN TO WHETHER YOU WANT
3 TO BE EVALUATED BY THE FBI AND HAVE A TOP SECRET CLEARANCE.

4 MR. GERAGOS: THE COURT HAS ALREADY ANTICIPATED WHEN
5 IT SAID WITHOUT PREJUDICE AS TO MR. MAC DOUGALL'S MOTION
6 BECAUSE I THINK CLEARLY THERE WILL BE A MOTION, A SEVERANCE
7 MOTION, PRECISELY BECAUSE OF THE DISPARATE POSITIONS OF
8 MR. FOGGO AND MR. WILKES. I WENT BACK AS I WAS COMING DOWN ON
9 THE TRAIN TODAY AND READ THE TRANSCRIPT FROM THE FIRST HEARING
10 HERE, AND MR. -- I HOPE I PRONOUNCE THIS CORRECT -- BHANDARI
11 WAS ADDRESSING THE COURT. AND IN THE TRANSCRIPT AT PAGE 6, HE
12 SAID, "NOW WE THINK THAT THE TRIAL CAN PROCEED ENTIRELY USING
13 UNCLASSIFIED INFORMATION." THAT WAS THE REPRESENTATION THAT
14 WAS MADE TO THIS COURT.

15 THAT WAS, BY THE WAY, AT THE SAME TIME THAT I WAS
16 SAYING BASED ON THE INDICTMENTS IN THE FIRST, I DID NOT THINK
17 THAT IT WAS FACTUALLY TOO COMPLEX TO RUSH TO TRIAL ON THE ONE,
18 BUT THAT I THOUGHT ON THE INDICTMENT INVOLVING MR. FOGGO, THAT
19 BASED ON WHAT I SAW AND BASED ON THE FACT THAT THEY SAID THEY
20 CAN PROCEED WITH UNCLASSIFIED INFORMATION, THAT WE CAN GO
21 FORWARD.

22 I STILL AM MAINTAINING THE POSITION I AM NOT GOING
23 TO, ABSENT TYING ME DOWN AND DOING SOMETHING ELSE, I DO NOT
24 PLAN TO UNDERGO ANY KIND OF A PROCESS BY WHICH MY ADVERSARY IN
25 AN ADVERSARIAL SYSTEM IS GOING TO DETERMINE WHETHER OR NOT I

1 CAN REPRESENT MY CLIENT. THERE'S ONLY ONE BODY THAT CAN
2 DETERMINE WHETHER I REPRESENT MY CLIENT, AND THAT'S THE
3 CALIFORNIA SUPREME COURT. AND AS LONG AS I'M IN GOOD STANDING
4 WITH THE CALIFORNIA SUPREME COURT, PERIOD, END OF STORY. THEY
5 DON'T HAVE THE ABILITY TO SAY "YES, YOU CAN" OR "NO, YOU
6 CAN'T."

7 THEY ALSO ARE TAKING THE POSITION THAT I MUST SEE
8 THIS OR THAT MY CLIENT MUST WAIVE MY OWN COMPETENCY BY NOT
9 GOING TO GET THAT INFORMATION. MR. FORGE, I BELIEVE,
10 INDICATED EARLIER TODAY IN REGARDS TO THE OTHER MOTION HAVING
11 TO DO WITH THE LEAKS NOTWITHSTANDING ANYTHING THAT THEY DO --
12 I THINK HIS QUOTE WAS NOTWITHSTANDING ANYTHING THAT'S TURNED
13 UP BY THE OTHER U.S. ATTORNEY'S OFFICE OR WHOEVER IT IS THAT
14 DOES THE INVESTIGATION, THEY STILL HAVE THEIR BRADY AND GIGLIO
15 OBLIGATIONS. THAT SOUNDS FAMILIAR BECAUSE THAT'S WHAT I WAS
16 SAYING THE LAST TIME WE WERE HERE.

17 IF THEY WANT TO WADE THROUGH THREE TERABYTES OR
18 WHATEVER IT IS OF USELESS INFORMATION THAT THEY CLAIM IS
19 CLASSIFIED OR TOP SECRET, THAT'S FINE AND DANDY. JUST GIVE ME
20 WHATEVER IS APPARENTLY BRADY OR GIGLIO.

21 BASED ON THEIR INDICTMENT, BASED ON EVEN THE
22 SUPERSEDING INDICTMENT, I BELIEVE THAT WE CAN GO FORWARD,
23 MR. WILKES AND I, SUBJECT TO A COUPLE OF OTHER -- TO THE TRIAL
24 SCHEDULE, WITH THAT CASE RELATIVELY QUICKLY WHEREAS I DO NOT
25 BELIEVE -- THAT'S WHY I COME FULL CIRCLE WHEN YOU SAID DENIED

1 WITHOUT PREJUDICE. I DON'T BELIEVE THAT MR. MAC DOUGALL IS IN
2 A POSITION TO DO SO. WE ARE AT COMPLETE OPPOSITE ENDS OF THE
3 SPECTRUM.

4 MR. WILKES -- APPARENTLY, IT WAS GOOD ENOUGH FOR THE
5 GOVERNMENT TO AWARD HIM HUNDREDS OF MILLIONS OF DOLLARS IN
6 CONTRACTS WITHOUT A SECURITY CLEARANCE. BUT IF YOU WANT TO GO
7 TO TRIAL, YOUR LAWYER HAS GOT TO GET A SECURITY CLEARANCE.
8 THERE'S SOMETHING THAT'S ABSURD ABOUT THAT.

9 THE IDEA THAT SOMEHOW I'M SUPPOSED TO GO AND DELAY
10 THAT PORTION OF THAT INDICTMENT WHILE WE GO THROUGH ALL OF THE
11 CIPA AND ALL THIS OTHER NONSENSE -- I CALL IT NONSENSE
12 RESPECTIVELY. I UNDERSTAND THAT THE GOVERNMENT'S POSITION IS
13 "LOOK, YOU KNOW, THERE ISN'T ANY OTHER COURT THAT'S EVER
14 DECLARED THIS UNCONSTITUTIONAL." THAT IS CORRECT. IN LOOKING
15 AT THE ARGUMENTS, I DO NOT BELIEVE THAT ANYBODY HAS RAISED
16 PRECISELY THE SAME ARGUMENTS THAT WE HAVE RAISED HERE.

17 THE COURT: REALLY? IT SEEMED TO TRACK THE
18 ARGUMENTS THAT WERE MADE IN THE NGUYEN HO LEE CASE. I WENT
19 OVER THAT AGAIN OVER THE WEEKEND. IT SEEMS TO ME THAT THE
20 DISTRICT JUDGE IN THAT CASE ANSWERED ALL OF THE ARGUMENTS THAT
21 ARE MADE BY YOU ON BEHALF OF MR. WILKES WITH RESPECT TO
22 SECTION 5 AND SECTION 6 OF CIPA DUE PROCESS.

23 LET ME TELL YOU WHERE I'M AT. I DON'T THINK I HAVE
24 ANY AUTHORITY TO ORDER YOU TO GO THROUGH A CLEARANCE THAT YOU
25 DON'T INTEND TO GO THROUGH. I SUPPOSE I HAVE AUTHORITY TO

1 FIND THAT YOU HAVE A CONFLICT BECAUSE YOU WON'T GO THROUGH IT
2 AND TO REMOVE YOU, BUT I LOOKED AT THE WHEAT CASE OVER THE
3 WEEKEND AND LAST WEEK.

4 I, FRANKLY, DON'T THINK THIS IS AT ALL CLOSE TO
5 WHEAT WHERE THE APPEARANCE -- FROM A PUBLIC STANDPOINT, THAT
6 THE APPEARANCE OF JUSTICE WAS BEING COMPROMISED.

7 THE PERSON, IT SEEMS TO ME -- IF THERE'S GOING TO BE
8 ANY DAMAGE DONE FROM YOUR REFUSAL TO UNDERGO THE SECURITY
9 CLEARANCE AND THEREBY NOT GET THE CLASSIFIED INFORMATION, THE
10 DAMAGE IS DONE TO MR. WILKES. IF HE'S CONTENT -- AND I WANT
11 TO TALK TO HIM PERSONALLY ABOUT THIS. BUT IF HE'S CONTENT AND
12 HE FEELS THAT RELYING ON YOUR INFORMATION THAT YOU CAN DEFEND
13 HIM ON THIS CHARGE WITHOUT REGARD TO THAT INFORMATION, THEN
14 I'M NOT IN A POSITION TO DECLARE THAT THERE'S SOME KIND OF
15 CONFLICT THAT WOULD CAUSE YOU TO BE OFF THE CASE, MR. GERAGOS.

16 BUT I DO THINK -- I THINK MR. FORGE POINTED THIS OUT
17 IN HIS PAPERS. THIS IS A WAIVER THAT BORDERS ON WAIVING SOME
18 FUNDAMENTAL RIGHTS ON MR. WILKES'S PART. MR. MAC DOUGALL
19 BROUGHT UP A SCENARIO THAT MAY OCCUR. IT MAY COME UP IN THE
20 COURSE OF THE TRIAL THAT SOME CLARIFICATION IS NECESSARY AS TO
21 CLASSIFIED MATERIAL. AND YOU -- NEITHER YOU NOR HE COULD BE A
22 PARTY TO THAT CONVERSATION JUST AS YOU'LL NOT BE A PARTY TO
23 THE CONVERSATIONS I HAVE WITH MR. MAC DOUGALL AND OTHER
24 COUNSEL FOR MR. FOGGO.

25 BUT I WANT TO MAKE SURE THAT MR. WILKES HAS A FULL

COMPUTER-AIDED TRANSCRIPTION

1 UNDERSTANDING OF THAT, THAT HE'S DISCUSSED IT FULLY WITH YOU,
2 AND THAT HE BUYS ONTO THOSE CONSEQUENCES. IT SEEMS TO ME THE
3 CONSEQUENCES ARE THESE: IF YOU DON'T HAVE TO UNDERGO A
4 SECURITY CLEARANCE -- I'M LOATHED TO IMPOSE THAT ON SOMEBODY
5 ANYWAY. THAT DOESN'T SEEM LIKE SOMETHING THAT ANY AGENT OF
6 THE UNITED STATES GOVERNMENT IN ANY BRANCH OUGHT TO BE DOING
7 TO SOMEBODY. THAT'S SOMETHING THAT MAYBE COMMUNIST BLOCK
8 NATIONS DO TO PEOPLE. SO I'M NOT --

9 MR. GERAGOS: THAT'S THE SAME REACTION THAT I HAD.

10 THE COURT: I'M NOT ONBOARD ON THAT.

11 BUT, AT THE SAME TIME, THERE'S A CONSEQUENCE. THE
12 CONSEQUENCE IS YOU DON'T GET THE CLASSIFIED INFORMATION, AND
13 YOU DON'T GET TO REFER TO THE CLASSIFIED INFORMATION, YOU
14 DON'T, HOWEVER YOU MAY HAVE LEARNED IT. BECAUSE AT THE END OF
15 THE DAY, THESE CIPA PROTECTIONS ARE REALLY DOUBLE-EDGED
16 SWORDS. AND ONE OF THE THINGS THEY'RE DESIGNED TO PREVENT IS
17 THE DISSEMINATION OF INFORMATION THAT'S CONSIDERED CLASSIFIED
18 IN OPEN COURT. AND REGARDLESS OF WHERE YOU OR MR. WILKES MAY
19 HAVE LEARNED IT, I CAN'T HAVE THAT HAPPENING.

20 SO IT'S NOT GOING TO BE BARRING THE DOOR AS TO
21 EVERYTHING YOU CAN GET INTO. THERE MAY BE INSTANCES WHERE I'M
22 GOING TO FORBID YOU FROM GETTING INTO SOMETHING IF THERE'S AN
23 OBJECTION AND IT TURNS OUT TO BE CLASSIFIED INFORMATION. AND
24 I DON'T THINK I CAN KNOW THAT UNTIL THE TIME. I THINK I MAY
25 HEAR AN OBJECTION. THE GOVERNMENT IS GOING TO HAVE TO BE ON

1 THEIR TOES AT THE TIME.

2 MY INCLINATION IS INSOFAR AS YOUR MOTION SAYS "YOU
3 CAN'T FORCE ME TO UNDERGO THE SECURITY CLEARANCE," I AGREE
4 WITH. I GRANT THE MOTION. I THINK SOME INQUIRY OF MR. WILKES
5 IS IN ORDER TO MAKE SURE THAT HE, AS A NON-LAWYER, UNDERSTANDS
6 ALL OF THE CONSEQUENCES OF THAT DECISION.

7 BUT I'VE LOOKED AT THE PROVISIONS OF CIPA. AND AS
8 YOU ACKNOWLEDGE, NO COURT HAS FOUND IT TO BE UNCONSTITUTIONAL.
9 I DON'T FIND THAT THE MINIMAL RESPONSIBILITY THAT YOU HAVE IS
10 UNCONSTITUTIONAL OR WOULD RENDER THOSE EITHER ON THEIR FACE OR
11 AS APPLIED TO MR. WILKES UNCONSTITUTIONAL.

12 I'M PREPARED TO MAKE FURTHER FINDINGS ON THAT. I'VE
13 LOOKED AT IT. I'VE RECONSIDERED THE ARGUMENTS. THE GREAT
14 WEIGHT OF THE AUTHORITY, OF COURSE, IS IN FAVOR OF FINDING
15 BOTH SECTION 5 AND 6, WHICH ARE THE TWO SECTIONS IMPLICATED
16 HERE, CONSTITUTIONAL.

17 AND THE DESCRIPTION. ALL YOU'RE CALLED UPON TO DO
18 IF YOU WENT THROUGH THIS PROCEDURE IS TO GIVE ME A BRIEF
19 EXPLANATION OF WHAT MATERIAL YOU WANT AND WHY IT'S RELEVANT.
20 YOU DON'T HAVE TO TELL ME WHETHER MR. WILKES IS GOING TO
21 TESTIFY OR FROM WHICH WITNESS YOU INTEND TO ELICIT IT OR HOW
22 YOU INTEND TO USE IT. MAYBE YOU NEED TO TELL ME THAT. YOU
23 CERTAINLY DON'T NEED TO TELL THE GOVERNMENT THAT. ALL THEY
24 HAVE IS THE NAKED INFORMATION THAT YOU'RE ASKING FOR. IT
25 WOULD BE LEFT FOR THEM TO TRY TO FIGURE IT OUT.

1 IN THAT REGARD, I THINK WHAT'S AT ISSUE HERE IS NOT
2 MUCH DIFFERENT -- THIS ISN'T LIKE THE BROOKS CASE. THIS IS
3 MORE LIKE TAYLOR VERSUS ILLINOIS AND LIKE THE WILLIAMS
4 CASE WHERE THERE'S A NOTICE OF ALIBI. FEDERAL CODE, OF
5 COURSE, IS REPLETE WITH INSTANCES WHERE A DEFENDANT HAS TO
6 REVEAL SOMETHING ABOUT HIS DEFENSE IN ORDER TO AVAIL HIMSELF
7 OF CERTAIN DEFENSES. NOTICE OF ALIBI. THERE'S RECIPROCAL
8 DISCOVERY OBLIGATIONS.

9 AND IT SEEMS TO ME THAT, IF ANYTHING, THIS
10 REQUIREMENT THAT YOU BRIEFLY DESCRIBE, THE RELEVANCY OF THIS
11 IS PROBABLY MORE BENIGN THAN WHAT YOU HAVE TO DO IN OTHER
12 INSTANCES TO MOUNT CERTAIN OTHER DEFENSES. SO I DON'T FIND A
13 CONSTITUTIONAL PROBLEM WITH IT. I'LL BE MORE SPECIFIC IN MY
14 FINDINGS.

15 DO YOU HAVE ANY OBJECTION TO ME MAKING INQUIRY OF
16 MR. WILKES ABOUT THE LIKELY CONSEQUENCES OF YOU NOT GOING
17 THROUGH THIS --

18 MR. GERAGOS: I DON'T HAVE ANY OBJECTION TO YOU
19 MAKING AN INQUIRY AS TO WHETHER OR NOT HE'S DISCUSSED IT. I
20 WOULD HAVE AN OBJECTION AS TO ANYTHING THAT'S IN THE FORM OF A
21 WAIVER OF ANY KIND; WHETHER HE'S DISCUSSED IT, WHETHER IT'S
22 KNOWING, WHETHER HE'S GOING FORWARD. BUT I DON'T WANT IT TO
23 BE CONSTRUED AS SOME USE OF A WAIVER BECAUSE THEN I THINK THAT
24 INTRUDES ON THE ATTORNEY-CLIENT RELATIONSHIP.

25 THE COURT: I WANT TO MAKE SURE THAT HE UNDERSTANDS

COMPUTER-AIDED TRANSCRIPTION

1 WHAT THE CONSEQUENCE IS OF YOU CHOOSING NOT TO GO THROUGH A
2 SECURITY CLEARANCE AND THE FACT THAT THAT IS GOING TO PREVENT
3 HIM FROM HAVING CERTAIN INFORMATION AVAILABLE TO YOU AND TO
4 HIM.

5 MR. GERAGOS: I UNDERSTAND THAT. I THINK JUST IN
6 FINAL, BASED UPON THAT, IF THE COURT DOES WHAT IT'S
7 TENTATIVELY AGREED TO DO, THEN I WOULD ORALLY AT LEAST NOTICE
8 THAT WE WILL DO A MOTION FOR SEVERANCE BASED UPON THAT AND
9 WHAT I BELIEVE IS THE COMPLETELY DISPARATE SITUATIONS THAT WE
10 ARE IN AS OPPOSED TO MR. FOGGO.

11 THE COURT: THERE IS NOTHING THAT FORECLOSES YOU
12 FROM BRINGING THAT.

13 MR. WILKES, LET ME TURN MY ATTENTION TO YOU. YOU'VE
14 DISCUSSED THIS MATTER WITH MR. GERAGOS.

15 DEFENDANT WILKES: I HAVE.

16 THE COURT: SO YOU HAVE AN UNDERSTANDING. THIS
17 STATUTE IS DESIGNED TO PREVENT THE DISSEMINATION OF CLASSIFIED
18 MATERIAL. AND ORDINARILY, SOMEONE TO WHOM THAT MATERIAL IS
19 GIVEN OVER HAS TO GO THROUGH A SECURITY CLEARANCE, AND THEN
20 THERE ARE RULES. YOU'VE HEARD ABOUT THE SKIFF AND ALL THE
21 SECURITY MEASURES THAT ARE TAKEN THAT INDEED MY STAFF IS
22 UNDERGOING, BACKGROUND CHECKS, SO THAT THEY CAN HAVE THE
23 APPROPRIATE CLEARANCES SO THAT THEY CAN BE PARTY TO THIS.

24 HERE'S THE CONSEQUENCE OF MR. GERAGOS NOT GOING
25 THROUGH THIS: YOU DON'T GET THE INFORMATION. I'M NOT GOING

1 TO TURN IT OVER TO YOU. AND IF YOU INDEPENDENTLY HAVE ACCESS
2 TO SOME OF THAT INFORMATION OR HAVE IN THE PAST, MR. GERAGOS
3 MIGHT BE FORECLOSED AT TRIAL FROM GETTING INTO IT IF THERE'S
4 AN OBJECTION FROM THE GOVERNMENT THAT THIS IS CLASSIFIED. AND
5 THAT'S GOING TO CUT OFF CERTAIN LINES OF DEFENSE TO YOU AND
6 THAT MR. GERAGOS MAY WANT TO PURSUE, BUT CAN'T.

7 I DON'T KNOW IF YOU WANT TO CALL IT A WAIVER, BUT I
8 WANT YOU TO TELL ME WHETHER YOU UNDERSTAND THAT'S THE
9 CONSEQUENCE OF MR. GERAGOS'S AND YOUR DECISION THAT HE NOT
10 UNDERGO A BACKGROUND CHECK.

11 DEFENDANT WILKES: I UNDERSTAND. I'M NOT AGREEING
12 TO A WAIVER AT THIS POINT. I DO UNDERSTAND THE IMPLICATIONS.
13 I DO UNDERSTAND WHAT CLASSIFIED DATA IS AND HOW IT'S
14 DISSEMINATED. I, TOO, HAVE HAD EMPLOYEES WITH CLEARANCES.
15 I'VE HAD SKIFFS IN MY FACILITIES. I'M AWARE OF IT. HAVING
16 SAID THAT, WITH ALL THESE CLASSIFIED EMPLOYEES AND SKIFFS, I
17 HAVE NEVER HAD A SINGLE PAGE OF CLASSIFIED INFORMATION IN ANY
18 OF MY FACILITIES.

19 THE COURT: HERE IT'S ANTICIPATED THERE IS GOING TO
20 BE CLASSIFIED INFORMATION. FROM EVERYTHING I KNOW -- AND I
21 HAVEN'T SEEN A PIECE OF IT EITHER. BUT FROM EVERYTHING I
22 KNOW, THE GOVERNMENT AND I THINK MR. FOGGO, AT LEAST,
23 ANTICIPATE THAT SOME OF THAT INFORMATION IS OR MAY BE RELEVANT
24 TO THE DEFENSE AGAINST THE CHARGES HERE. AND YOU WILL NOT GET
25 THAT INFORMATION. YOU'LL BE FOREGOING RECEIPT OF THAT

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1 INFORMATION FROM THE UNITED STATES BECAUSE YOU'RE NOT GOING
2 THROUGH THE CIPA PROCEDURE.

3 DO YOU UNDERSTAND THAT?

4 DEFENDANT WILKES: YES.

5 MR. GERAGOS: MAY I ADD THAT TO THE EXTENT, HOWEVER,
6 THAT IT REMAINS GIGLIO OR BRADY, I DO NOT THINK THAT CIPA
7 TRUMPS THAT.

8 THE COURT: I AGREE WITH YOU. THEIR OBLIGATIONS
9 REMAIN UNDER BRADY AND GIGLIO. WE'RE TALKING ABOUT
10 INFORMATION THAT THEY HAVE SOME DISCRETION TO TURN OVER OR NOT
11 THAT HAPPENS TO BE CLASSIFIED THAT WOULD BE SUBJECT TO THESE
12 PROCEDURES. THAT'S WHAT WE'RE TALKING ABOUT.

13 AND MR. GERAGOS, I'M GOING TO MAKE IT VERY CLEAR.
14 YOU'RE NOT AND MR. WILKES IS NOT, BY ANSWERING THESE
15 QUESTIONS, WAIVING ANY ASSERTION THAT YOU'VE MADE REGARDING
16 THE CONSTITUTIONALITY OF THESE PROVISIONS. MY POINT IS I WANT
17 TO MAKE SURE MR. WILKES UNDERSTANDS THAT THERE WILL BE OR MAY
18 BE CONSEQUENCES TO THE DECISION, THAT YOU WON'T BE GETTING
19 FULL INFORMATION THAT YOU MIGHT OTHERWISE GET FROM THE UNITED
20 STATES.

21 IT COULD HAPPEN, MR. WILKES, THAT SOME OF THIS
22 STUFF -- ALTHOUGH I KNOW YOU THINK YOU KNOW IT, SOME OF THIS
23 STUFF THAT MAY COME UP YOU MAY NOT HAVE ANTICIPATED. IT MAY
24 CATCH YOU BY SURPRISE, AND THAT MAY BE DETRIMENTAL TO YOU.

25 DO YOU UNDERSTAND THAT THAT'S ONE OF THE

1 POSSIBILITIES HERE?

2 DEFENDANT WILKES: YES, I UNDERSTAND EXACTLY THAT.

3 I THINK THERE'S A REVERSE SIDE OF THAT AS WELL THAT I PREFER
4 NOT TO DISCUSS HERE.

5 THE COURT: THAT'S FINE. YOU DON'T NEED TO TELL ME
6 WHAT YOU'RE THINKING, JUST THAT YOU UNDERSTAND THAT THAT'S
7 WHAT THE CONSEQUENCES ARE.

8 MR. FORGE, IS THERE ANOTHER INQUIRY THAT YOU THINK I
9 NEED TO MAKE WITH MR. WILKES, OR MS. CHU?

10 MS. CHU: IF I MAY, YOUR HONOR.

11 THE GOVERNMENT DOES NOT AT ALL WANT TO INFRINGE UPON
12 MR. WILKES'S RIGHT TO COUNSEL. HE CERTAINLY HAS A RIGHT TO
13 THE ASSISTANCE OF COUNSEL. BUT I WOULD SUBMIT THAT HE DOESN'T
14 HAVE A RIGHT TO ESSENTIALLY WHAT WOULD BE INEFFECTIVE
15 ASSISTANCE OF COUNSEL. THE GOVERNMENT HAS GRAVE CONCERNS
16 ABOUT THAT IN THIS CASE.

17 THE COURT: HERE'S THE PROBLEM I HAVE: THE POWER OR
18 DISCRETION OF THE COURT TO INTERVENE AND ESSENTIALLY TAKE
19 MR. GERAGOS OFF THIS CASE, AS I UNDERSTAND, IS LIMITED TO
20 THOSE INSTANCES WHERE THERE WOULD BE AN APPEARANCE OF
21 INJUSTICE TO THE PUBLIC AT LARGE.

22 THAT WAS THE CASE IN WHEAT. THE GUY WANTED
23 MR. IREDALE AS HIS COUNSEL. HE DIDN'T CARE, BUT THE COURT
24 DETERMINED THAT IT JUST LOOKED BAD. HERE I DON'T THINK THE
25 GENERAL INTEREST OR APPEARANCE OF JUSTICE IS IMPLICATED. IT

1 MAY BE A BAD DEAL FOR MR. WILKES, BUT HE'S ACKNOWLEDGED THAT
2 HE UNDERSTANDS THAT THERE MAY BE SOME CONSEQUENCES, IT MAY BE
3 A BAD DEAL.

4 AND WHAT HE'S TELLING ME AND THE POSITION I HAVE
5 FROM MR. WILKES AND MR. GERAGOS IS I'M WILLING TO ACCEPT THAT
6 "I WANT MR. GERAGOS DEFENDING ME." AND I DON'T SEE, MS. CHU,
7 HOW THAT OTHERWISE DETRACTS FROM THE GENERAL APPEARANCE OF
8 JUSTICE HERE. THEY SEEM VERY CONFIDENT TO ME THAT THEY KNOW
9 HOW THEY'RE GOING TO DEFEND THIS CASE AND THAT IT ISN'T
10 NECESSARILY DEPENDENT UPON THE RECEIPT OF CERTAIN CLASSIFIED
11 INFORMATION.

12 SO I'M NOT IN A POSITION WHERE I CAN SAY, "WELL,
13 NECESSARILY, MR. GERAGOS IS GOING TO RENDER INCOMPETENT
14 REPRESENTATION." I DON'T THINK THAT'S THE CASE HERE.

15 MS. CHU: THE APPROPRIATE INQUIRY WOULD BE
16 WHETHER -- YOUR HONOR, I THINK IT ESPECIALLY IS A WAIVER OF
17 THE RIGHT TO PROCEED WITH COUNSEL WHO WOULD HAVE CLEARANCE.
18 THAT WAIVER HAS TO BE KNOWING, INTELLIGENT, AND VOLUNTARY.

19 IF HE DOESN'T KNOW WHAT HE IS ACTUALLY GIVING UP
20 BECAUSE HE HASN'T HAD AN OPPORTUNITY TO REVIEW THAT TO
21 DETERMINE WHETHER OR NOT IT'S SOMETHING MATERIAL TO THE
22 DEFENSE, THEN, YOUR HONOR, THE WAIVER WOULD BE DIFFICULT TO --

23 THE COURT: IT WOULD BE IMPOSSIBLE. THERE'S A
24 PROBLEM WITH WHAT YOU SAY. IF I REQUIRE THEM TO KNOW WHAT THE
25 INFORMATION IS BEFORE HE DECIDES WHETHER HE WANTS TO WAIVE IT,

1 THEN MR. GERAGOS IS NECESSARILY OFF THE CASE. SO I CAN'T DO
2 THAT.

3 HE'S GOT A PRETTY GOOD IDEA. YOU'VE TOLD HIM YOU'VE
4 GOT AMMUNITION THAT'S CLASSIFIED AND YOU INTEND TO SHOOT WITH
5 IT. HE SAYS, "FIRE AWAY. I'M READY TO DEFEND. I DON'T NEED
6 TO KNOW IN ADVANCE WHAT IT IS."

7 MS. CHU: THAT'S WHY WE PROPOSED THE PROCEDURES
8 OUTLINE IN OUR PAPERS IN TERMS OF HAVING THE COURT REVIEW SOME
9 OF THIS INFORMATION. IF THERE'S SIGNIFICANT RIGHTS, THEN HE'S
10 GIVING UP THE OPPORTUNITY TO LATER CLAIM THAT HE SHOULD HAVE
11 HAD MORE INFORMATION.

12 THE COURT: TELL ME WHERE IT GOES. I LOOK AT IT AND
13 I SAY, "THIS LOOKS LIKE PRETTY POTENT STUFF. I'D BETTER,"
14 WHAT, "GO OVER IT WITH MR. WILKES"? I CAN'T DO THAT. I DON'T
15 KNOW WHERE THAT LEADS. IF IT'S CLASSIFIED AND HIS LAWYER
16 HASN'T AGREED TO A PROCEDURE WHERE HE CAN HAVE ACCESS TO
17 CLASSIFIED INFORMATION, HOW DO I SHARE IT WITH MR. WILKES?

18 AND I WOULDN'T BRING HIM IN WITHOUT HIS COUNSEL
19 BEING PRESENT. I'M SURE MR. GERAGOS WOULD OBJECT. HE DOESN'T
20 WANT A MEETING WITH ME AND HAVING ME TRY TO TALK HIM OUT OF
21 MR. GERAGOS'S --

22 MR. CHU: CERTAINLY, YOUR HONOR, HE CAN RETAIN
23 COUNSEL OF HIS CHOICE, BUT THAT RIGHT IS LIMITED. IF IT'S
24 GOING TO BE ESSENTIAL BECAUSE YOUR HONOR FINDS THAT THE
25 INFORMATION IS, IN FACT, MATERIAL, THAT IT'S SOMETHING THAT HE

1 SHOULD KNOW AND IT'S IMPORTANT TO HIS DEFENSE, THEN I THINK WE
2 HAVE A PROBLEM THERE THAT COUNSEL OF HIS CHOICE MAY NOT BE
3 EFFECTIVE FOR HIM.

4 THE COURT: MS. CHU, LET ME STOP YOU THERE. THAT'S
5 A POINT WORTH FURTHER DISCUSSION.

6 MR. GERAGOS REPRESENTED EARLY ON, AND I THINK HE
7 CONFIRMED IT TODAY, THAT HE THINKS HE KNOWS A LOT OF THE
8 INFORMATION THAT IS OSTENSIBLY CLASSIFIED. HE MAY BE WRONG ON
9 THAT, BUT HE THINKS HE KNOWS IT ALREADY.

10 HOW DO I PROBE THAT WITH MR. WILKES OR MR. GERAGOS?
11 I SUPPOSE I COULD HINT AROUND AND SEE IF THEY HAD AN
12 UNDERSTANDING LOOK WHEN I SAID THINGS. I DON'T KNOW. I DON'T
13 KNOW HOW WE COULD GET INTO IT.

14 MS. CHU: YOUR HONOR, I DON'T THINK THE PROBING
15 WOULD BE AS TO WHAT MR. GERAGOS KNOWS OR DOESN'T KNOW OR WHAT
16 CLASSIFIED INFORMATION HAS ALREADY GOTTEN TO HIM. THE
17 PROCEDURE THE GOVERNMENT PROPOSED WAS TO LAY OUT FOR THE COURT
18 THE CLASSIFIED INFORMATION THAT WE'VE DESIGNATED AS
19 APPROPRIATELY PRODUCED IN DISCOVERY, WHICH, BY DEFINITION, BY
20 THE FACT THAT WE'RE PRODUCING IT, THE GOVERNMENT THINKS COULD
21 BE POSSIBLY MATERIAL TO THE DEFENSE.

22 YOUR HONOR HAS BECOME FAMILIAR WITH THE SUPERSEDING
23 INDICTMENT, WHICH DOES CHARGE AS SOME OF THE ACTS THEREIN
24 DISCLOSURE -- INAPPROPRIATE DISCLOSURE OF CLASSIFIED
25 INFORMATION. IT'S CLEAR THAT CLASSIFIED INFORMATION MAY

1 BECOME AT ISSUE HERE. SO THE PROCEDURE --

2 THE COURT: WHAT'S STEP 2? YOU SHOW IT TO ME, AND I
3 MAKE A JUDGMENT ON WHETHER I THINK IT'S REALLY IMPORTANT TO
4 THE DEFENSE. AND WHAT'S STEP 2?

5 MS. CHU: THAT'S THE CASE. THERE IS THE CASES --
6 THERE IS INFORMATION THAT'S MATERIAL TO THE DEFENSE. AND IT
7 WOULD SEEM TO BE INEFFECTIVE IF THAT DEFENDANT DOESN'T HAVE
8 ACCESS TO THAT MATERIAL.

9 THE COURT: HOW DO I DETERMINE WHETHER THEY ALREADY
10 KNOW IT? MR. GERAGOS HAS SAID IN THE PAST THAT "SOME OF THIS
11 IS THINGS THAT THE GOVERNMENT DOESN'T THINK WE KNOW. WE
12 ALREADY KNOW." HOW DO I MAKE THAT DETERMINATION?

13 MR. GERAGOS: I WOULD LIKE TO INTERJECT. I MAY BE
14 MISSING SOMETHING.

15 IF IT'S MATERIAL TO THE DEFENSE, I'M INTERPRETING IT
16 AS BRADY. IF IT'S BRADY, THEY HAVE TO TURN IT OVER. IF IT'S
17 NOT MATERIAL TO THE DEFENSE, MEANING IT'S NOT BRADY, AND THEY
18 THINK IT'S KRYPTONITE AND THEY'RE GOING TO PUT IT IN FRONT OF
19 THE JURY, IF THE JURY GETS IT, I GET IT. SO EITHER WAY, IF
20 IT'S SOMETHING THAT'S RELEVANT, IT'S EITHER HELPFUL TO ME AND
21 THEY HAVE TO TURN IT OVER OR IT'S HARMFUL TO ME AND THEY'RE
22 GOING TO PUT IT IN FRONT OF THE JURY.

23 THE COURT: IT'S BROADER THAN THAT, MR. GERAGOS.
24 THEY HAVE TO TURN OVER MATERIAL EVIDENCE ON HOW THEY'RE GOING
25 TO PROVE THEIR CASE AND ESSENTIALLY GIVE YOU AND MR. WILKES A

1 ROAD MAP. AND I THINK WHAT MS. CHU IS SAYING IS SOME OF THIS
2 FALLS INTO THAT CATEGORY WHERE YOU'RE GOING TO BE CAUGHT A
3 LITTLE BIT OFF GUARD, SHE THINKS. NOW, I DON'T KNOW HOW SHE
4 KNOWS THAT, AND I DON'T KNOW WHAT TO MAKE OF IT.

5 MR. GERAGOS: I'VE PRACTICED IN DISTRICTS WHERE YOU
6 DON'T GET THE MATERIAL UNTIL AFTER DIRECT. IT'S CERTAINLY NOT
7 GOING TO -- ANYTHING THAT THEY PLAN ON BRINGING IN HERE AND
8 PUTTING IN FRONT OF THE JURY I'M GOING TO GET IN THE DISTRICTS
9 WHERE THEY HAVE STRICT COMPLIANCE WITH THE ACT.

10 SO IT'S NO DIFFERENT. THAT'S WHY I DON'T KNOW WHAT
11 THEIR PROTESTATION IS. IF THEY'VE GOT IT, THEN BRING IT ON.

12 THE COURT: YOU'RE GOING TO GET SOME FORM OF IT, BUT
13 YOU MAY NOT HAVE IT IN ITS ENTIRE CONTEXT. WE BOTH KNOW THAT.
14 THEY MAY USE THE FIRST PARAGRAPH OF A REPORT. AND YOU MAY
15 SAY, "WAIT A MINUTE. I'VE SEEN THE WHOLE THING. THE
16 FOLLOWING THREE PARAGRAPHS REALLY INFORM AND CHANGE THE
17 MEANING OF THAT." YOU'RE NOT GOING TO HAVE THAT OPPORTUNITY
18 HERE BECAUSE THE DOCUMENT'S NOT GOING TO BE HANDED OVER TO YOU
19 IF IT'S DETERMINED TO BE CLASSIFIED. CERTAINLY, YOU CAN GO
20 WITH WHAT THEY PRESENT IN A PUBLIC FORUM."

21 MR. GERAGOS: WHATEVER THEY WANT TO PRESENT IN FRONT
22 OF THE JURY WITH A WITNESS ON THE WITNESS STAND, I'M OKAY WITH
23 THAT.

24 MS. CHU: YOUR HONOR, WE TALKED A LITTLE BIT BEFORE
25 ABOUT HOW BRADY AND GIGLIO CAN'T TRUMP -- CIPA DOESN'T TRUMP

1 THOSE THINGS, BUT THAT'S PRECISELY WHAT THE CONCERN IS. THAT
2 IF BRADY OR GIGLIO -- THAT MATERIAL DOES -- IS CLASSIFIED,
3 THEN THERE'S A LIMITATION ON WHAT WE CAN DISCLOSE BECAUSE CIPA
4 PROVIDES THE PROCEDURES TO DISCLOSE THAT INFORMATION. THE
5 AGENTS HAVE EXPLORED IT PRE-TRIAL. AND FINALLY AT THE TIME
6 THAT IT REACHES TRIAL, IT REACHES A JURY, IT REACHES A PUBLIC
7 FORUM, THOSE DETERMINATIONS WILL HAVE BEEN MADE. THAT'S
8 EXACTLY IN PLACE.

9 YOUR HONOR, THERE IS A LIMITATION ON DISCLOSURE OF
10 BRADY AND THOSE TYPES OF THINGS, MATERIAL INFORMATION, BECAUSE
11 THERE IS POTENTIALLY CLASSIFIED MATERIAL THAT IS IMPLICATED
12 THERE. AND THAT'S WHY CIPA IS SO SUPPORTED, AND THAT'S WHY
13 THIS PROCEDURE IS SET IN PLACE SO THAT WHEN IT GETS TO TRIAL,
14 THEY'LL HAVE ALL THAT CLEAN UP, EVERYONE KNOWS WHAT THE
15 LIMITATIONS AND THE RESTRICTION ARE, AND SO THAT THE DEFENSE
16 CAN REVIEW THE ENTIRETY OF THAT INFORMATION TO DETERMINE
17 WHETHER THEY NEED TO MAKE A CIPA MOTION PRE-TRIAL TO BRING
18 MORE OF THAT INFORMATION IN BECAUSE THEY FEEL IT'S NECESSARY
19 TO THE DEFENSE.

20 THE COURT: IT'S YOUR POSITION THAT IF SOMETHING'S
21 CLASSIFIED AND ALSO BRADY, IT DOESN'T GET TURNED OVER?

22 MS. CHU: YOUR HONOR, YES. IF HE DOESN'T HAVE THE
23 CLEARANCE AND IT'S CLASSIFIED, HE DOESN'T GET IT. THAT'S THE
24 PROVISION.

25 MR. GERAGOS: ON ITS FACE, IT'S UNCONSTITUTIONAL.

COMPUTER-AIDED TRANSCRIPTION

1 THE COURT: I HAVEN'T SEEN ANY AUTHORITY TO SUPPORT
2 THAT PROPOSITION. I WOULD THINK THAT IF IT'S BRADY -- AND
3 PARTICULARLY IN THE SENSE IT'S EXCULPATORY, THAT YOUR
4 OBLIGATION WOULD BE TO TURN THAT INFORMATION OVER.

5 NOW, MAYBE CIPA GIVES US SOME LATITUDE AND YOU CAN
6 SANITIZE IT IN SOME WAY. BUT I WOULD THINK THE ESSENCE OF THE
7 MATERIAL HAS TO BE TURNED OVER. I HAVEN'T SEEN ANYTHING IN
8 YOUR PAPERS THAT SAYS CIPA EXEMPTS YOU FROM BRADY AND GIGLIO
9 OBLIGATIONS.

10 MR. FORGE: WE DIDN'T FULLY EXPLORE THE
11 EFFECTIVENESS OF COUNSEL ISSUE IN THE PAPERS. BUT ONE POINT
12 WE WANT TO MAKE IS, AS YOUR HONOR'S AWARE AND MR. GERAGOS IS
13 AWARE, BRADY IS OFTEN IN THE EYES OF THE BEHOLDER. WHAT MIGHT
14 BE BRADY TO MR. GERAGOS MAY NOT BE TO US. OUR DISCLOSURES
15 UNDER THE BRADY RUBRIC IS OFTEN MUCH BROADER THAN WHAT'S
16 REQUIRED UNDER THE CASE LAW.

17 THE COURT: YOU'RE PREPARED TO MAKE BRADY
18 DISCLOSURES AS YOU RECOGNIZE THEM IRRESPECTIVE OF WHETHER IT'S
19 CLASSIFIED INFORMATION?

20 MR. FORGE: NO, YOUR HONOR. BECAUSE I DO BELIEVE
21 BRADY REQUIRES THEM TO HAVE THE OPPORTUNITY. WE ARE
22 PRESENTING THEM WITH THE OPPORTUNITY.

23 THE COURT: WHAT IF IT'S APPARENT TO YOU WITHOUT ANY
24 INPUT FROM DEFENSE COUNSEL THAT SOMETHING'S EXCULPATORY?
25 YOU'RE SAYING YOU'RE NOT GOING TO TURN IT OVER?

1 MR. FORGE: I'M SAYING IF IT'S APPARENT TO US AND
2 IT'S CLASSIFIED AND WE CAN'T SANITIZE IT -- WE CAN SANITIZE IT
3 AS BEST WE CAN, BUT THAT MIGHT DILUTE THE MEANING OF IT TO THE
4 POINT WHERE MR. GERAGOS MIGHT NOT SEE WHAT HE NEEDS TO SEE.
5 WE DON'T HAVE THE RIGHT TO HAVE INSIGHTS INTO HIS DEFENSE.
6 I'M NOT TRYING TO GET THAT INSIGHT.

7 THE PROBLEM THAT IS BEING CREATED HERE IS THAT WHILE
8 HE'S TRYING TO PROTECT HIS DEFENSE FROM US, HE'S REQUIRING US
9 TO KNOW THE DEFENSE IN ORDER TO DETERMINE WHAT IS OR IS NOT
10 MATERIAL TO THAT DEFENSE AND WHAT COULD BE SANITIZED IN A WAY
11 TO STILL MAKE A --

12 THE COURT: I DON'T HEAR HIM SAYING THAT. I HEAR
13 HIM SAYING THAT WITH RESPECT TO THINGS THAT ARE APPARENTLY
14 EXONERATORY AND APPARENTLY IMPEACHING, IF YOU RECOGNIZE THAT
15 WITHOUT ANY INPUT FROM HIM, YOU HAVE AN OBLIGATION TO TURN
16 THOSE THINGS OVER.

17 THERE'S A PROCEDURE UNDER OUR STANDARD DISCOVERY
18 RULES. IF YOU'RE AT ALL IN QUESTION ABOUT IT, PRESENT IT TO
19 ME UNDER RULE 12, AND I'LL TELL YOU "YEAH, I THINK THIS IS,
20 AND I THINK THIS OUGHT TO GO OVER." I DON'T KNOW WHY WE
21 COULDN'T USE THE NORMAL CONVENTIONS THAT WE USE IN OTHER
22 CASES.

23 MR. FORGE: NEITHER MS. CHU NOR I MEANT TO SUGGEST
24 THAT THESE ARE DETERMINATIONS WE WOULD MAKE EXCLUSIVELY ON OUR
25 OWN WITHOUT ANY NOTICE TO THE COURT.

1 THE COURT: HELP ME WITH THIS.

2 MS. CHU TOOK ME TO THE FIRST STEP, WHICH IS "BEFORE
3 YOU CAN ACCEPT THIS CONCESSION FROM MR. WILKES AND MR. GERAGOS
4 THAT HE DOESN'T NEED TO HAVE A SECURITY CLEARANCE, YOU, JUDGE,
5 SHOULD LOOK AT THE INFORMATION AND MAKE SOME DETERMINATION."

6 WHAT'S STEP 2? WHERE DO I GO WITH THAT --

7 MR. FORGE: WELL, I THINK STEP 2 --

8 THE COURT: -- IF HE'S STANDING STEADFAST AND HE
9 DOESN'T WANT TO HAVE THIS?

10 MR. FORGE: I THINK STEP 2 FALLS INTO A WHEAT
11 SITUATION. IT'S NOT IN THE PUBLIC EYE. IT'S JUST AN ACTUAL
12 CONFLICT. IF YOUR HONOR LOOKS AT THIS INFORMATION -- AND HERE
13 WE HAVE A PRIMA FACIE CASE THAT'S GOING TO ARISE WHEN YOU
14 JUXTAPOSE MR. MAC DOUGALL'S REPRESENTATIONS WITH MR. GERAGOS'S
15 POSITION. MR. MAC DOUGALL REPRESENTS THAT THERE ARE TOP
16 SECRET DOCUMENTS THAT ARE ESSENTIAL TO MR. FOGGO'S DEFENSE.
17 NOW, THEIR DEFENSES ARE SOMEWHAT HAND IN HAND.

18 THE COURT: I DON'T KNOW THAT, DO YOU?

19 MR. FORGE: NO. I DON'T HAVE THE INSIGHT INTO THEIR
20 DEFENSES, AND I'M NOT TRYING TO GET THAT INSIGHT. WHAT I'M
21 SAYING IS MR. MAC DOUGALL HAS AT LEAST RAISED THE NOTION THAT
22 THERE ARE CLASSIFIED DOCUMENTS, HIGHLY CLASSIFIED DOCUMENTS,
23 THAT ARE MATERIAL TO A DEFENSE IN THIS CASE.

24 AND TO PICK UP WHERE MS. CHU LEFT OFF, IF, UPON
25 REVIEWING THOSE DOCUMENTS, YOUR HONOR AGREES AND SAYS "THIS IS

1 MATERIAL. IT MIGHT NOT BE CONVINCING, IT MIGHT NOT RAISE A
2 REASONABLE DOUBT, BUT UNDER THE LEGAL STANDARDS IT IS
3 MATERIAL," IN ORDER TO RENDER EFFECTIVE ASSISTANCE, AN
4 ATTORNEY WOULD HAVE TO HAVE ACCESS TO THIS INFORMATION TO AT
5 LEAST CONSIDER ITS USE.

6 NOW, AT THAT POINT IS STEP 2 THAT YOUR HONOR IS
7 INQUIRING ABOUT. AT THAT POINT, I BELIEVE YOU WOULD HAVE AN
8 ACTUAL CONFLICT. NOT AN APPARENT CONFLICT. I THINK YOU WOULD
9 HAVE AN ACTUAL CONFLICT BECAUSE WE WOULD HAVE AN ATTORNEY WHO,
10 FOR HIS OWN REASONS -- AND I'M NOT QUESTIONING THE MERITS OF
11 THOSE REASONS OR THE SINCERITY OF MR. GERAGOS'S CONVICTION --
12 FOR HIS OWN PERSONAL REASONS, HE'S DECLINING TO GET SECURITY
13 CLEARANCE.

14 AGAIN, THIS IS NOT AN ISSUE OF DISCLOSURE. THIS IS
15 JUST AN ISSUE OF SECURITY CLEARANCE. FOR HIS OWN PERSONAL
16 REASONS, HE'S CHOOSING NOT TO GET SECURITY CLEARANCE. HE IS
17 MAKING A PERSONAL DECISION THAT IS IN CONFLICT WITH HIS
18 REPRESENTATION OF HIS CLIENT.

19 THE STEP 2, YOUR HONOR, THAT'S WHERE WE HAVE A
20 CONFLICT. AND THAT'S WHERE YOUR HONOR COULD
21 DECLARE MR. GERAGOS UNQUALIFIED TO REPRESENT MR. WILKES.

22 THE COURT: THE AUTHORITY I HAVE UNDER WHEAT, IT
23 SEEMS TO ME, IMPACTS THE APPEARANCE OF JUSTICE FROM A PUBLIC
24 STANDPOINT. AND I DON'T SEE THAT HAPPENING HERE EVEN IF WHAT
25 YOU SAY COMES TRUE.

1 WHAT I SEE IS MR. WILKES MAY BE IN THE DOGHOUSE --
2 HE MAY BE BECAUSE HE DOESN'T HAVE THIS INFORMATION. BUT HE
3 TOLD ME IN A NUMBER OF ITERATIONS NOW THAT HE UNDERSTANDS THAT
4 THAT'S ONE OF THE POTENTIAL CONSEQUENCES GOING INTO THIS.

5 HOW DO I IMPOSE ON HIM SOME DIFFERENT LAWYER FROM
6 THE ONE THAT HE'S CHOSEN WHEN I DON'T FIND IT GENERALLY
7 APPEARS TO BE A CONFLICT. IT'S PECULIAR TO HIM AND HIS
8 LAWYER, BUT EVERYONE KNOWS WHAT'S HAPPENING HERE. HE'S GIVING
9 UP HIS RIGHT TO HAVE THIS CLASSIFIED INFORMATION, AND THEY'RE
10 WILLING TO GO FORWARD. AND I CAN IMAGINE THAT MAYBE IN THE
11 ORDER OF THINGS, IF THE CASE IS JOINTLY TRIED, MR. GERAGOS
12 WILL TELL MR. MAC DOUGALL "YOU CROSS-EXAMINE FIRST, AND I'LL
13 LISTEN AND TAKE NOTES BEFORE I GO."

14 MR. FORGE: THAT'S FINE. BUT TO GO BACK TO THE
15 ITERATIONS TO WHICH YOUR HONOR REFERRED, WE NEED TO HEAR THAT
16 MAGIC WORD. WE NEED TO HEAR "WAIVER." THIS DOES HAVE TO BE,
17 AS MS. CHU POINTED OUT, A KNOWING, VOLUNTARY, AND INTELLIGENT
18 WAIVER.

19 THE COURT: TELL ME SPECIFICALLY WHAT HE'D BE
20 WAIVING, JUST HIS RIGHT TO THAT MATERIAL?

21 MR. FORGE: THAT'S RIGHT. HE'S WAIVING HIS RIGHT
22 AND HIS RIGHT TO HAVE COUNSEL HAVE ACCESS TO THOSE MATERIALS,
23 AND THAT ACCESS WOULD PROVIDE THEM WITH THE ABILITY TO SEE
24 WHETHER THERE'S INFORMATION THAT'S HELPFUL IN CROSS-EXAMINING
25 WITNESSES OR PUTTING ON THEIR OWN DEFENSE OR IN ANY OTHER WAY

1 DEFENDING THE CASE.

2 THE COURT: I THINK HE'S GOT A POINT, MR. GERAGOS.
3 EVERYTHING IS ABOUT KNOWING, VOLUNTARY, AND INTELLIGENT
4 WAIVERS. AND THEY'VE LAID IT OUT, AND I THINK EVERYBODY
5 UNDERSTANDS WHAT'S AT ISSUE HERE, MR. WILKES.

6 ESSENTIALLY, UNDERSTANDING THESE DIRE CONSEQUENCES
7 THAT THE PROSECUTOR HAS ALLUDED TO AND THAT I'VE TALKED ABOUT,
8 YOU KNOW THAT THOSE CONSEQUENCE POTENTIALLY AWAITS YOU AND
9 YOU'RE WILLING TO ABIDE THOSE CONSEQUENCES AND GIVE UP YOUR
10 RIGHT TO HAVE ACCESS TO THIS MATERIAL AND HAVE MR. GERAGOS
11 HAVE ACCESS TO THIS MATERIAL?

12 MR. GERAGOS: WE ABSOLUTELY, CATEGORICALLY DO NOT
13 GIVE UP OUR RIGHT TO BRADY AND GIGLIO.

14 THE COURT: I UNDERSTAND.

15 MR. GERAGOS: I DON'T THINK THEY DO. EVERYTHING I'D
16 HEARD BETWEEN THE TWO OF THEM BACK AND FORTH, I DIDN'T GET
17 THAT IMPRESSION. I DON'T THINK THEY UNDERSTAND THAT BRADY
18 TRUMPS CIPA AND GIGLIO TRUMPS CIPA.

19 THE COURT: THAT'S MY VIEW AS WELL. HERE'S WHAT
20 MR. FORGE IS SAYING: SOMETIMES -- AND THE LEGERS CASE, AS YOU
21 KNOW, SPOKE TO THIS, MR. GERAGOS. SOMETIMES THEY CAN'T
22 ENTIRELY KNOW WHAT THEIR PERSPECTIVE IS IN THE CASE OR WHAT
23 YOUR DEFENSE IS GOING TO BE OR HOW YOU'RE GOING TO DEFEND IT.
24 AND IF THEY KNEW THAT, THAT MIGHT CONDITION HOW THEY USE
25 CERTAIN INFORMATION OR WHETHER IT WAS EXONERATORY.

1 BECAUSE YOU WON'T GO THROUGH THIS AND MAKE REQUESTS
2 OF THEM, THEN THEY'RE NOT GOING TO BE ABLE TO LOOK AT IT IN A
3 LIGHT THAT YOU DIRECT THEM TO. THEY'RE NOT GOING TO BE ABLE
4 TO LOOK AT IT THAT WAY. I AGREE WITH YOU. TO THE EXTENT THAT
5 THINGS ARE APPARENT OR SHOULD BE APPARENT ON THEIR FACE THAT
6 THEY'RE EXONERATORY OR THAT THEY IMPEACH WITNESSES, THAT THEIR
7 CONSTITUTIONAL OBLIGATIONS TRUMP THE STATUTORY PROVISIONS OF
8 CIPA, AND THEY HAVE TO GIVE THAT OVER.

9 IF THERE'S ANY QUESTION ABOUT IT REGARDING THE STEPS
10 OR PROCEDURES, THEY'LL PRESENT IT TO ME. AND I'LL LOOK AT IT,
11 AND I'LL MAKE THE DETERMINATION AND THEN TURN OVER WHAT IS
12 RELEVANT.

13 THAT NOTWITHSTANDING, WHAT I THINK MR. WILKES NEEDS
14 TO SAY IS "I UNDERSTAND THE CONSEQUENCES OF PROCEEDING IN THE
15 MANNER THAT MY LAWYER SUGGESTS. I'M WILLING TO DO THAT, AND
16 I'M WILLING TO GIVE UP ANY RIGHTS I MAY HAVE UNDER CIPA TO
17 OTHERWISE HAVE ACCESS TO CLASSIFIED MATERIAL THAT'S NOT BRADY
18 AND NOT GIGLIO."

19 MR. GERAGOS: I WOULD AGREE THAT HE CAN GO FORWARD
20 AND SAY THAT HE GIVES UP ANY RIGHTS UNDER CIPA BECAUSE WE FIND
21 CIPA EVEN MORE SO, AS ARTICULATED HERE TODAY, TO BE, ON ITS
22 FACE, UNCONSTITUTIONAL. SO TO THAT EXTENT, I'D SAY THAT.

23 THE COURT: I THINK THAT'S IT, MR. FORGE. IF HE
24 GIVES UP HIS RIGHTS UNDER CIPA TO THE PRODUCTION OF THIS
25 MATERIAL -- AND HE UNDERSTANDS NOW THAT YOU'RE NOT GOING TO

1 HAVE THE BENEFIT OF HIS PERSPECTIVE ON HOW THIS MAY BE
2 RELEVANT -- YOU'RE GOING TO BE LEFT TO YOUR OWN DEVICES TO
3 DETERMINE WHAT IS APPARENTLY EXONERATORY, AND ANY QUESTIONS
4 WILL BE RUN THROUGH ME, AND I'LL MAKE A DETERMINATION TO TURN
5 IT OVER.

6 BUT I THINK IF HE HAVE WAIVES HIS RIGHT TO
7 PRODUCTION UNDER CIPA THAT HE'D OTHERWISE HAVE, THAT THAT'S A
8 SUFFICIENT WAIVER, DON'T YOU?

9 MR. FORGE: I DON'T. I THINK IT'S SOMETHING THAT WE
10 CAN ADDRESS.

11 THE COURT: WHAT ELSE DO YOU THINK HE NEEDS TO
12 WAIVE?

13 MR. FORGE: I THINK THIS BRADY/GIGLIO ISSUE IS FAR
14 MORE COMPLICATED THAN WE CAN ADDRESS AT THIS TIME. I'M
15 SHOOTING FROM THE HIP HERE. BECAUSE WHEN YOU THINK ABOUT WHAT
16 CIPA -- THE IMPETUS FOR CIPA, THE IMPETUS FOR CIPA WAS TO
17 AVOID SITUATIONS WHERE A DEFENDANT WANTS TO RAISE CLASSIFIED
18 INFORMATION OR SAYS HE NEEDS ACCESS TO CLASSIFIED INFORMATION.
19 AND WHEN FORCED TO MAKE THAT CHOICE WITHOUT ANY PROTECTIONS
20 THE GOVERNMENT CAN'T PROCEED.

21 IT'S ESSENTIALLY A GRAY MAIL SITUATION WHERE THEY'RE
22 SAYING, "YOU STILL HAVE TO GIVE US EVERYTHING. YOU HAVE TO
23 GIVE US ALL THE BRADY AND ALL THE GIGLIO, BUT WE'RE NOT GOING
24 TO CONFORM WITH THE STATUTE THAT WAS SPECIFICALLY ENACTED TO
25 ENABLE YOU TO DO THAT WHILE PRESERVING THESE MATTERS THAT ARE

1 IN THE NATIONAL SECURITY."

2 SO I DON'T THINK THAT IT IS AS SIMPLE -- BRADY AND
3 GIGLIO ARE OBVIOUSLY SEMINAL CASES. THEY INVOLVE THE
4 DEFENDANT'S DUE PROCESS RIGHTS. WE RESPECT THEM. WE WILL
5 ADHERE TO THEIR TEACHINGS. BUT IT IS NOT AS SIMPLE AS SIMPLY
6 SAYING THAT THESE ARE SEMINAL CASES; AND THEREFORE, THEY TRUMP
7 EVERYTHING ELSE.

8 CIPA WAS DESIGNED IN ORDER TO BALANCE RIGHTS UNDER
9 BRADY, UNDER GIGLIO, AND UNDER OTHER CASES WITH THE
10 GOVERNMENT'S RIGHT TO PRESERVE THE CLASSIFIED STATUS OF
11 INFORMATION AS IMPORTANT TO OUR NATIONAL SECURITY.

12 SO I JUST DON'T THINK IT'S AS SIMPLE AS ONE TRUMPING
13 THE OTHER. I THINK THAT WE HAVE A SYSTEM SET IN PLACE THAT
14 PERMITS MR. GERAGOS AND HIS CLIENT ACCESS TO THIS INFORMATION.
15 THEY ARE OPTING OUT OF THAT SYSTEM. BY OPTING OUT OF THAT
16 SYSTEM, I THINK THE CONSEQUENCES ARE MUCH GREATER THAN WHAT
17 THEY'RE WILLING TO WAIVE AT THIS POINT.

18 THE COURT: WELL, I DISAGREE WITH THAT CONSTRUCTION
19 OF IT. I THINK THE CONSTITUTIONAL OBLIGATIONS UNDER THOSE TWO
20 CASES TO PROVIDE THE DEFENDANT WITH EXONERATORY OR IMPEACHMENT
21 MATERIAL TRUMP ANY STATUTORY PROVISIONS. CONGRESS WOULDN'T
22 HAVE BEEN AUTHORIZED TO SAY THAT BRADY IS DISPENSED WITH UNDER
23 THESE CIRCUMSTANCES.

24 NOW, IT MAY BE, MR. FORGE, THAT THERE'S A WAY TO
25 GIVE THE MATERIAL OVER AND NOT GIVE UP THE GHOST IN TERMS OF

1 CLASSIFIED INFORMATION. AND THAT MAY BE YOUR OBLIGATION IN
2 THIS CASE TO DO THAT. BUT I CAN'T IMAGINE A SCENARIO WHERE
3 I'D ASK MR. WILKES TO WAIVE HIS BRADY AND GIGLIO RIGHTS TO
4 THIS EXTENT: HE UNDERSTANDS THAT WITHOUT THE BENEFIT OF HIS
5 THEORY OR HIS LAWYER'S THEORY PROPOUNDING SPECIFIC QUESTIONS
6 TO YOU, THAT YOU MAY NOT HAVE AN UNDERSTANDING OF CERTAIN
7 MATERIAL THAT COULD BE DEEMED EXCULPATORY BY THEM AND, IN
8 FACT, IS. WE'RE NOT TALKING ABOUT THAT. WE'RE TALKING ABOUT
9 STAND-ALONE EXCULPATORY OR IMPEACHMENT MATERIAL. AND IF YOU
10 RECOGNIZE IT AS SUCH, I THINK YOU'VE GOT TO GIVE IT OVER.

11 NOW, WHETHER THERE'S SOME PERMUTATION OR YOU CHANGE
12 IT A LITTLE BIT OR YOU CHANGE THE DAY THAT YOU SUBMIT IT TO ME
13 AND SAY "FOR THESE REASONS, HERE'S THE GIST OF IT. BUT WE
14 DON'T WANT THE PARTICULARS," WE'LL LEAVE THAT FOR ANOTHER DAY.

15 I'M SATISFIED THAT IF HE WAIVES HIS RIGHTS UNDER
16 CIPA FOR THE RECEIPT OF CLASSIFIED INFORMATION, BUT STANDS ON
17 HIS RIGHT TO RECEIVE EXCULPATORY AND IMPEACHING MATERIAL, THAT
18 THAT'S SUFFICIENT FOR TODAY.

19 MR. WILKES, YOU PAID ATTENTION TO THE WHOLE
20 DISCUSSION.

21 YOU UNDERSTAND EVERYTHING THAT'S BEEN DISCUSSED?

22 DEFENDANT WILKES: FOR THE MOST PART, YES.

23 THE COURT: IS THERE ANY PART YOU NEED ME TO CLARIFY
24 BEFORE YOU MAKE THE DECISION TO GIVE UP YOUR RIGHTS UNDER CIPA
25 TO THE PRODUCTION OF INFORMATION?

1 DEFENDANT WILKES: NO. I'M COMFORTABLE WITH THAT
2 WAIVER. IT JUST APPEARS TO ME AS A NON-LAWYER THAT WE'RE
3 DEFINING A SLIVER OF SPACE HERE. I HAVE THE RIGHT TO THE
4 INFORMATION I NEED.

5 THE COURT: I'M NOT GOING TO LET THAT HAPPEN. THESE
6 PROSECUTORS ARE VERY EXPERIENCED AND VERY HONEST. IF THEY SEE
7 SOMETHING THAT IS EXONERATORY THAT TENDS TO POINT IN THE
8 DIRECTION OTHER THAN WHAT THE ACCUSATIONS ARE, THEY'RE LEGALLY
9 OBLIGATED. I'M CONFIDENT THAT THEY WILL TURN THAT OVER TO YOU
10 ANYWAY.

11 SO ALL WE'RE TALKING ABOUT TODAY, MR. WILKES, IS THE
12 CIPA PROVISIONS. THAT IF MR. GERAGOS GOES THROUGH THE
13 CLEARANCE PROCEDURES, HE WOULD BE ENTITLED TO CERTAIN
14 INFORMATION. IF HE'S NOT GOING TO DO THAT, THE CONSEQUENCE IS
15 YOU'RE NOT GOING TO GET THE BULK OF THE INFORMATION THAT THEY
16 DEEM CLASSIFIED. BUT YOU RESERVE YOUR RIGHT TO EXONERATORY
17 AND IMPEACHING MATERIAL.

18 IS THAT ACCEPTABLE TO YOU AND DO YOU GIVE UP YOUR
19 RIGHT TO PRODUCTION OF MATERIAL UNDER CIPA?

20 DEFENDANT WILKES: IT IS.

21 THE COURT: MR. FORGE, ANYTHING ELSE YOU THINK I
22 NEED TO TAKE FROM HIM IN TERMS OF A WAIVER? I THINK HE GETS
23 IT. WE'VE COVERED IT UNTIL THE COWS COME HOME.

24 MR. FORGE: NOT AT THIS TIME. WE WILL ADDRESS IT
25 WITH THE COURT IN WRITING.

1 THE COURT: OKAY. I REITERATE THE GOVERNMENT HAS
2 STAND-ALONE BRADY AND GIGLIO RESPONSIBILITIES. IF THERE'S
3 SOME QUESTION ABOUT HOW YOU HAVE TO DISCHARGE THOSE THAT
4 IMPLICATES CLASSIFIED INFORMATION, THAT YOU SHOULD PUT IT TO
5 ME UNDER THE AUSPICES OF RULE 12, AND I'LL GO OVER IT WITH
6 YOU. BUT AT THE END OF THE DAY, HE'S ENTITLED TO EXONERATORY
7 AND IMPEACHING MATERIAL.

8 AND I DON'T FIND, MS. CHU, THAT I HAVE GROUNDS FOR
9 REMOVING MR. GERAGOS AT THIS POINT. I FIND THAT MR. WILKES
10 UNDERSTANDS FULLY THE CONSEQUENCE OF MR. GERAGOS DECLINING TO
11 GO THROUGH THE PROCESS AND THAT HE HAS WAIVED HIS RIGHT TO
12 PRODUCTION OF INFORMATION PURSUANT TO CIPA, WHICH HE GETS TO
13 DO. IT WOULD BE UNPRECEDENTED IF THERE WAS SOMETHING THAT HE
14 COULDN'T WAIVE HIS RIGHT TO -- IT'S UNWAIVERABLE, AT LEAST IN
15 THE CONTEXT OF A CASE LIKE THIS.

16 NOW, MR. GERAGOS, DO YOU WANT TO SAY ANYTHING MORE
17 ABOUT THESE PROVISIONS, OR ARE YOU SATISFIED WITH YOUR PAPERS?

18 MR. GERAGOS: I'M SATISFIED WITH THE PAPERS AND THE
19 COLLOQUY THAT'S TAKEN PLACE SUBSEQUENT TO THAT.

20 THE COURT: LET ME MAKE MY RULINGS, THEN, WITH
21 RESPECT TO THE SPECIFIC MOTIONS THAT YOU'VE MADE.

22 YOU'VE ARGUED IN SUPPORT OF DECLARING CIPA
23 UNCONSTITUTIONAL, THAT IT VIOLATES MR. WILKES'S RIGHTS UNDER
24 THE 5TH AND 6TH AMENDMENTS. THAT'S THE GENERAL ARGUMENT.

25 IN PARTICULAR, YOU'VE ARGUED THAT THE NOTICE AND

1 HEARING REQUIREMENTS SET FORTH IN SECTION 5, WHICH REQUIRES
2 YOU TO GIVE A BRIEF EXPLANATION OF THE MATERIAL YOU WANT AND
3 WHY IT'S RELEVANT, AND THEN SECTION 6, WHICH I'LL TALK ABOUT
4 MORE LATER, COMPELS MR. WILKES TO NOTIFY THE PROSECUTION AND
5 IMPAIRS HIS RIGHT TO TESTIFY.

6 AS I MENTIONED, I'VE RELIED, IN GREAT PART, ON THE
7 DISTRICT COURT DECISION IN UNITED STATES VERSUS NGUYEN HO LEE
8 AT 90 FED. 2D 1324. I THINK IT DOES ADDRESS THE VERY
9 ARGUMENTS THAT HAVE BEEN RAISED BY MR. WILKES IN THIS CASE.

10 I'VE ALSO RELIED ON THE DECISION OF THE UNITED
11 STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN U.S. VERSUS
12 WILSON IN GENERALLY UPHOLDING CIPA AGAINST THE CONSTITUTIONAL
13 CHALLENGE THAT IT VIOLATES THE PRIVILEGE AGAINST
14 SELF-INCRIMINATION AND THE DEFENDANT'S 6TH AMENDMENT RIGHT.

15 HERE, AS I SAID, MR. GERAGOS, YOU'VE RELIED ON
16 BROOKS VERSUS TENNESSEE. IN THAT CASE, THE SUPREME COURT
17 STRUCK DOWN THE STATUTE THAT REQUIRES THE DEFENDANT TO TESTIFY
18 FIRST OR NOT AT ALL.

19 I THINK THAT THIS CASE IS CLOSER TO TAYLOR VERSUS
20 ILLINOIS AND WILLIAMS VERSUS FLORIDA.

21 IN TAYLOR VERSUS ILLINOIS, THERE WAS A WITNESS
22 NOTIFICATION -- A DEFENSE WITNESS NOTIFICATION STATUTE THAT
23 WAS CHALLENGED. THE SUPREME COURT UPHELD THAT.

24 SIMILARLY, IN WILLIAMS VERSUS FLORIDA, THERE WAS A
25 NOTICE OF ALIBI STATUTE. AND THE SUPREME COURT UPHELD THAT

1 AGAINST SIMILAR CHALLENGES TO THOSE MADE IN THIS CASE.

2 THE GOVERNMENT POINTS OUT -- AND I PREVIOUSLY
3 ALLUDED TO THIS -- THERE ARE NUMEROUS SECTIONS OF THE UNITED
4 STATES CODE THAT CURRENTLY REQUIRE A SIMILAR NOTICE ON THE
5 PART OF A DEFENDANT IN ORDER TO MOUNT CERTAIN DEFENSES.

6 I'M TRYING TO FIND THE SECTION. WHERE WERE THOSE
7 LISTED, MR. FORGE, YOUR EXAMPLES?

8 MR. FORGE: ONE MOMENT. I THINK MS. CHU HAS THOSE.

9 MS. CHU: STARTING AT SECTION 3, PAGES 8, 9, AND
10 FOLLOWING WHERE IT DISCUSSES -- AND THE TOP ON 10 THAT
11 DISCUSSES THE NUMBER OF EVIDENTIARY AND PROCEDURAL
12 REQUIREMENTS FOR PRE-TRIAL DISCLOSURE.

13 THE COURT: THAT'S RIGHT. I FOUND IT NOW AT THE TOP
14 OF 10.

15 THE CODIFICATIONS IN THE FEDERAL RULES AND IN THE
16 CASE LAW, JUST BY WAY OF EXAMPLE, ARE THESE: THE DEFENDANT
17 HAS TO GIVE NOTICE UNDER 12.2 OF AN INSANITY DEFENSE OR IS
18 FORECLOSED FROM RAISING SUCH A DEFENSE. LIKEWISE, UNDER 12.3,
19 A PUBLIC AUTHORITY DEFENSE OR THE CONSEQUENCE IS FORECLOSED
20 FROM RAISING SUCH A DEFENSE. PURSUANT TO RULE 16, MEDICAL AND
21 SCIENTIFIC TESTS MUST BE DISCLOSED IN ADVANCE.

22 I ONCE HAD A CASE IN THIS VERY COURTROOM WHERE GAMES
23 WERE PLAYED AND MATERIAL WAS NOT TURNED OVER AND IT WAS BARRED
24 EVEN THOUGH IT WAS A VITAL PART OF THE DEFENSE. IT WAS UPHELD
25 BY THE 9TH CIRCUIT BECAUSE OF A VIOLATION OF THESE VERY RULES.

COMPUTER-AIDED TRANSCRIPTION

1 ALL OF THESE RULES HAVE BEEN FOUND TO IMPINGE, TO
2 SOME EXTENT, ON THE ABSOLUTE OF FREE REIGN OF A DEFENDANT TO
3 DECIDE WHETHER TO TESTIFY AND WHAT DEFENSE TO MOUNT, BUT NOT
4 UNCONSTITUTIONALLY SO.

5 AND I FIND THE CIPA PROVISIONS, WHICH, AS I'VE
6 MENTIONED, ARE WORDED IN SUCH A WAY THAT THEY DO NOT REQUIRE A
7 DEFENDANT TO NOTIFY EITHER THE COURT OR THE GOVERNMENT WHETHER
8 HE INTENDS TO TESTIFY OR WHAT THE SUBJECT MATTER OF THE
9 TESTIMONY WILL BE, NOR HOW HE INTENDS TO USE THE INFORMATION
10 AS IMPERMISSIBLE INFRINGEMENTS ON THE DEFENDANT'S 5TH OR
11 6TH AMENDMENT RIGHTS.

12 I THINK AS I READ CIPA AND COMPARE IT TO THESE OTHER
13 PROVISIONS WHICH REQUIRE SOME NOTIFICATION OF INFORMATION THAT
14 THERE IS STILL SIGNIFICANT CONTROL ON THE PART OF THE DEFENSE
15 AS TO HOW THE DEFENSE WILL BE PRESENTED.

16 SO THE MERE IDENTIFICATION OF MATERIAL THAT THE
17 DEFENSE BELIEVES TO BE RELEVANT OR COULD BE RELEVANT OR MIGHT
18 BE USED IN SOME WAY I DON'T THINK UNCONSTITUTIONALLY IMPINGES
19 ON MR. WILKES'S 5TH OR 6TH AMENDMENT RIGHTS.

20 I DO THINK THAT AN IMPORTANT INTEREST IS SERVED.
21 YOU GENERALLY CAN'T HAVE A BURDEN ON A DEFENDANT'S 5TH OR
22 6TH AMENDMENT RIGHTS TO ANY EXTENT UNLESS IT'S OFFSET BY SOME
23 COMPELLING INTEREST. HERE THE COMPELLING INTEREST IS
24 EVIDENCE; THE GOVERNMENT'S INTEREST IN MAINTAINING CLASSIFIED
25 INFORMATION AND ALL THAT THAT IMPLICATES, INCLUDING IN THIS

1 CASE, I'M TOLD, NATIONAL SECURITY. AND I THINK THAT'S A
2 SIGNIFICANT COUNTERVAILING INTEREST THAT JUSTIFIES THE SLIGHT
3 IMPINGEMENT ON ANY DEFENDANT'S ABILITY TO DEFEND HIMSELF
4 AGAINST CHARGES SUCH AS THE ONES FILED IN THIS CASE.

5 NEITHER DO I FIND THAT MR. WILKES'S RIGHT TO BE
6 CONFRONTED BY WITNESSES AGAINST HIM AND TO CROSS-EXAMINE THOSE
7 WITNESSES ARE UNCONSTITUTIONALLY BURDENED BY THIS. AS I SAID,
8 THE PROCEDURES ARE MAINLY BENIGN. AND, IN FACT, AS I LOOKED
9 AT THIS, MY TENDENCY AS DEFENSE COUNSEL -- I'M NOT TELLING YOU
10 HOW TO TRY THIS CASE -- WOULD BE TO BE OVER-INCLUSIVE, SAY, "I
11 WANT ALL OF THIS. I THINK ALL OF THIS IS RELEVANT." MAYBE
12 SOME OF IT'S NOT, AND MAYBE YOU'D HAVE A HARD TIME CONVINCING
13 ME OF THAT. BUT AT LEAST YOU MIGHT THROW OFF THE OPPONENT,
14 AND THE OPPONENT WOULDN'T HAVE AN IDEA OF WHERE YOU'RE GOING
15 TO GO WITH INFORMATION BECAUSE YOU'RE OVERLY INCLUSIVE IN THE
16 REQUEST AND THE MATERIALITY.

17 SO, I MEAN, I THINK THERE'S SUBSTANTIAL LEEWAY FOR
18 DEFENSE COUNSEL TO PROTECT THEIR CLIENT'S 6TH AMENDMENT
19 INTEREST, 5TH AMENDMENT INTEREST. AND CIPA PROVIDES THAT. AT
20 THE END OF THE DAY, YOU STILL HAVE TO CONVINCE ME THAT THIS
21 INFORMATION WAS MATERIAL. BUT IT MAY BE MATERIAL, AND YOU MAY
22 NOT INTEND TO USE IT AT ALL. OR IT MAY GO IN A COMPLETELY
23 DIFFERENT DIRECTION FROM THE DEFENSE THAT YOU CHOOSE TO MOUNT.

24 SO, AS I SAID, I ADOPT AS MY OWN THE REASONING IN
25 THE NGUYEN HO LEE CASE. I FIND THAT THAT CASE ANSWERS THE

1 OBJECTIONS THAT HAVE BEEN RAISED BY MR. WILKES IN THIS CASE.

2 IN SUM, I FIND THAT CIPA IS AND REMAINS
3 CONSTITUTIONAL IN THAT REGARD. IT'S NOTHING NEW. I DIDN'T
4 DRAW A WRITTEN ORDER BECAUSE SO MANY HAVE BEEN WRITTEN ON THIS
5 SUBJECT THAT I'D SIMPLY BE REITERATING THE VIEWS OF OTHER
6 JUDGES THAT HAVE LOOKED AT THIS.

7 THE MOTION TO DECLARE CIPA AS UNCONSTITUTIONAL IS
8 DENIED. MR. WILKES'S WAIVER OF ENTITLEMENT TO INFORMATION
9 PURSUANT TO CIPA AS A STATUTE IS ACCEPTED.

10 THERE'S THE ISSUE ABOUT PROTECTIVE ORDERS,
11 MR. MAC DOUGALL. I'M PREPARED TO HEAR FURTHER FROM YOU IF YOU
12 WANT ME TO GO OVER THAT NOW. I CAN TELL YOU TENTATIVELY AS TO
13 THE FIRST PROTECTIVE ORDER THAT'S BEEN SUBMITTED, MY
14 INCLINATION IS TO ACCEPT IT WITH THE EXCEPTION OF LINE 13,
15 WHICH I WOULD MODIFY PURSUANT TO THE GOVERNMENT'S SUGGESTION.
16 YOUR PROTECTIVE ORDER IS "NOTWITHSTANDING ANY OTHER PROVISION
17 OF LAW OR AGREEMENT."

18 THE GOVERNMENT SUGGESTED A MODIFICATION DELETING
19 "NOTWITHSTANDING ANY OTHER PROVISION OF LAW" AND SUBSTITUTING
20 IN PLACE THEREOF "IN ACCORDANCE WITH THE CLASSIFIED
21 INFORMATION PROCEDURES ACT AND THE CITATION TO THAT ACT."

22 IS THAT ACCEPTABLE?

23 MR. DOBER: YOUR HONOR, THAT'S ACCEPTABLE.

24 THE COURT: WITH THAT MODIFICATION, THEN, MR. DOBER,
25 IF YOU'LL REDRAFT IT, I'LL BE HAPPY TO SIGN OFF ON THE FIRST

1 SUGGESTED PROTECTIVE ORDER.

2 MS. CHU: I BELIEVE THE GOVERNMENT ATTACHED AS
3 EXHIBIT A TO THE MOTION JUST SUCH A DRAFT.

4 THE COURT: OKAY. THEN NO NEED. I'LL SIGN THEIR A.
5 HAVE YOU LOOKED AT IT?

6 MR. DOBER: YES.

7 THE COURT: A WILL BE THE PROTECTIVE ORDER SIGNED BY
8 THE COURT.

9 TURNING TO THE SECOND OFFERED PROTECTIVE ORDER,
10 AGAIN, I'M INCLINED TO ACCEPT THIS AND TO SIGN IT EXCEPT
11 PAGE 3, LINES 8 THROUGH 11 -- NO -- PAGE 2, LINES 8 THROUGH
12 11. I'M INCLINED TO STRIKE THAT PROVISION ABOUT WITHIN
13 20 DAYS, THE GENERAL COUNSEL SHALL PRODUCE TO MR. FOGGO'S
14 COUNSEL THE NAMES OF PEOPLE THAT WILL BE AUTHORIZED.

15 AND FURTHERMORE, SO THAT THERE'S NO QUESTION ABOUT
16 THE MEANING OF CIA ADMINISTRATION, I INTEND TO PUT IN EITHER
17 PARENTHETICALLY OR ADDING ON CIA ADMINISTRATION MEANS THE CIA
18 OFFICIAL OR OFFICIALS RESPONSIBLE FOR AUTHORIZING CONTACT
19 PURSUANT TO THE 2(E) REGULATIONS.

20 IS THAT AGREEABLE?

21 MS. CHU: THE GOVERNMENT OBJECTS TO THIS PARTICULAR
22 SECOND ORDER FOR THE REASONS SET FORTH IN OUR PAPERS. THEY
23 HAVE A PROCEDURE SET IN PLACE. I'M INFORMED THAT FOR 20-ODD
24 YEARS, THIS IS THE PROCEDURE THAT'S IN PLACE. THEY HAVE
25 COMPLIED WITH IT. IT HASN'T BEEN MODIFIED.

1 THE COURT: WHAT'S THE OBJECTION, THEN, TO ME
2 PUTTING THE COURT'S IMPRIMATUR ON IT AND SAYING, THEN, "DON'T
3 DO THIS BECAUSE YOU'RE SUBJECT TO CONTEMPT SANCTIONS IN
4 ADDITION TO WHATEVER SANCTION THAT THE CIA WOULD IMPOSE UPON
5 YOU"?

6 I MEAN, THIS IS, AFTER ALL, A JUDICIAL PROCEDURE.
7 AND ONE OF THEIR CONCERNS IS THAT WHOEVER GETS THE REQUEST
8 FROM THEM DOESN'T PICK UP THE PHONE AND SAY, "HEY, MS. CHU,
9 LET ME TELL YOU WHAT THEY'RE ASKING FOR."

10 SO WHY SHOULDN'T I ALSO ENDEAVOR TO POLICE THAT THAT
11 DOESN'T HAPPEN? BY SAYING THAT, I DON'T HAVE ANY REASON TO
12 BELIEVE IT'S GOING TO HAPPEN. I ACCEPT THAT THOSE ARE THE
13 PROCEDURES. WHERE THIS IS DIFFERENT, THIS ISN'T A REQUEST
14 MADE INDEPENDENT OF THE JUDICIAL SYSTEM. THIS IS A REQUEST
15 BEING MADE PURSUANT TO AN ACTIVE CASE.

16 MS. CHU: CERTAINLY, YOUR HONOR. WE DID DISCUSS
17 THOSE WITH THE REPRESENTATIVES OF THE OFFICE OF GENERAL
18 COUNSEL, WHO ARE PRESENT HERE FOR THE HEARING TODAY.

19 THE COURT: WHO IS THE GENTLEMAN?

20 IS THAT AGREEABLE TO YOU? I DON'T SECOND-GUESS THAT
21 YOU'RE GOING TO HAVE FIDELITY TO THESE PROCEDURES, BUT THIS
22 ARISES IN A DIFFERENT CONTEXT THAN YOU MAY SEE A REQUEST. I
23 UNDERSTAND SOMEBODY MAY -- THERE MAY NOT BE A COURT CASE
24 PENDING. SOMEBODY MAY WANT INFORMATION. YOU MAY GET IT TO
25 THEM.

1 HERE THEIR CONCERN IS OBVIOUS. THEY DON'T WANT THE
2 PROSECUTION TO KNOW WHAT THEY'RE ASKING ABOUT. THE
3 PROSECUTION IS NOT ENTITLED TO THAT, AND I DON'T THINK THEY'RE
4 GOING TO CALL YOU AND ASK YOU FOR THAT. I UNDERSTAND THAT'S
5 PART OF YOUR REGULATIONS AND MANNER OF DOING BUSINESS, BUT
6 WHAT THE HECK?

7 IF I SAY, "IT'S ALSO ORDERED BY THE COURT. AND IF
8 ANYBODY VIOLATES THOSE CIA REGULATIONS AND DOES DISCLOSE TO
9 THE GOVERNMENT, THEY FACE THE SANCTION OF CONTEMPT FROM THIS
10 COURT," DO YOU HAVE A PROBLEM WITH THAT?

11 MR. MC PHERSON: NO, YOUR HONOR.

12 JOHN MC PHERSON FROM THE CIA OFFICE OF GENERAL
13 COUNSEL.

14 I HAVE NO OBJECTION. IT IS A RATHER ROUTINE REQUEST
15 THAT WE RECEIVE ALL THE TIME. I WOULD HOPE IT WOULD BE
16 HANDLED ROUTINELY AND NOT TRY TO DRAFT SOME EQUIVALENT RULE 60
17 PROCEDURES ON THERE TO TIE --

18 THE COURT: I DON'T INTEND TO DO THAT. IN FACT, AS
19 I SAID, I INTEND TO STRIKE OUT THE PROVISION WHERE YOU HAVE TO
20 NOTIFY ME OR THEM OF WHO IS IN THE CHAIN OF COMMAND IN MAKING
21 THESE DECISIONS. I DON'T THINK YOU HAVE TO DO THAT. AND I AM
22 GOING TO NARROW THE DEFINITION OF THE CIA AS THE
23 DECISION-MAKERS ON THESE REQUESTS. THAT'S ONLY COMMON SENSE.

24 AT THE END OF THE DAY, IT HAS TO BE ENFORCEABLE BY
25 COURT RULES AS WELL AS CIA RULES BECAUSE WE'VE HAD SOME

1 PROBLEMS ALREADY, AS YOU HEARD, MR. MC PHERSON, ON INFORMATION
2 GETTING OUT THAT OUGHT NOT TO GET OUT. I'M INCLINED TO DO
3 THAT.

4 YOU DON'T HAVE A PROBLEM WITH THAT?

5 MR. MC PHERSON: I DON'T HAVE A PROBLEM WITH THAT.

6 THE COURT: WILL THAT DO, THEN, MR. DOBER?

7 MR. DOBER: YES, YOUR HONOR.

8 THE COURT: YOU WANT TO REDRAFT THIS ORDER, THEN?

9 MR. DOBER: YES.

10 THE COURT: LET ME TELL YOU WHAT I WANT YOU TO
11 ELIMINATE.

12 PAGE 2, LINE 8 THROUGH 11 ARE TO BE ELIMINATED. AND
13 THEN ON PAGE 1, "IT IS HEREBY ORDERED THAT THE CIA
14 ADMINISTRATION," AND I WANT YOU TO PUT IN A PARENTHETICAL.
15 "(THAT IS, CIA OFFICIALS RESPONSIBLE FOR AUTHORIZING CONTACT
16 PURSUANT TO THE 2(E) REGULATIONS)," END QUOTE AND CLOSED
17 PARENTHESES. WITH THAT, I'LL SIGN THAT SECOND PROTECTIVE
18 ORDER.

19 LET ME TURN TO THE THIRD ONE.

20 THIS IS ESSENTIALLY A REITERATION OF THE REQUEST
21 THAT I MAKE THE OBLIGATIONS RECIPROCAL. I'M NOT INCLINED TO
22 DO THAT, MR. DOBER. I'M HAPPY TO HEAR FROM YOU. HERE'S WHAT
23 LED ME.

24 FIRST, I WAS INCLINED TO SAY, "OKAY. THAT'S FINE.
25 LET'S DO IT." BUT I WAS PERSUADED, AFTER LISTENING TO THE

1 COURT SECURITY OFFICER AS WELL AS GOVERNMENT COUNSEL, THEY
2 HAVE THE INTEREST IN THE FIRST INSTANCE WITH RESPECT TO
3 CLASSIFIED INFORMATION. THEY'RE THE ONES THAT DETERMINE THAT
4 IT'S CLASSIFIED. SO IT'S A LITTLE SUPERFLUOUS FOR ME TO SAY,
5 "OH, BY THE WAY, DON'T RELEASE ANY CLASSIFIED INFORMATION OR
6 YOU'RE GOING TO BE SANCTIONED BY THE COURT." THEY'RE GOING TO
7 HAVE HELL TO PAY AT A MUCH HIGHER LEVEL IF THEY DO THAT.

8 MR. DOBER: YOUR HONOR, TWO POINTS IN RESPONSE TO
9 THAT.

10 FIRST, IN TERMS OF THE DETERMINATION OF THE
11 CLASSIFICATION OF THE DOCUMENTS, I DO THINK THERE'S A
12 DIFFERENCE HERE BETWEEN THE GOVERNMENT AGENCY, THE DEPARTMENT
13 OF JUSTICE, AND THE CENTRAL INTELLIGENCE AGENCY. THE
14 EXECUTIVE ORDER THAT'S IN PLACE AND THAT HAS BEEN IN PLACE
15 VESTS INDIVIDUAL AGENCIES WITH THE AUTHORITY TO INITIAL
16 CLASSIFICATION DECISIONS.

17 SO IT'S NOT THE DEPARTMENT OF JUSTICE MAKING THE
18 CLASSIFICATION DECISIONS. IT'S THE CIA MAKING
19 CLASSIFICATIONS. AND WE'RE SAYING THE DEPARTMENT OF JUSTICE
20 SHOULD HAVE TO LIVE BY THE SAME CLASSIFICATIONS THAT THE CIA
21 DOES, JUST AS WE SHOULD.

22 THE COURT: DOESN'T CIPA SORT OF SUPPLANT ALL THIS
23 AND REQUIRE EXACTLY WHAT YOU'RE SAYING? I'M TOLD THEY HAVE
24 EVERYTHING IN A SKIFF AND THAT -- CERTAIN MATERIALS WEREN'T
25 TURNED OVER TO ME UNTIL I HAD A SKIFF IN PLACE, TOO. THEY

1 WERE RETAINED, I THINK IN ONE INSTANCE, BY MR. HALPERN.
2 WASN'T THERE ONE OF THE DECLARATIONS IN THIS CASE THAT YOU HAD
3 TO HANG ONTO BECAUSE I DIDN'T HAVE SECURE FACILITIES?

4 MR. HALPERN: YES. WE KEPT THEM IN A LOCKED SAFE IN
5 A SKIFF.

6 THE COURT: SO IT JUST SEEMS TO ME THAT I'M KIND OF
7 BUTTING IN, MR. DOBER, WHERE THERE'S NO NEED FOR ME TO BUTT
8 IN.

9 MR. DOBER: WELL, YOUR HONOR, WE SUBMIT THAT WE
10 THOUGHT THAT CIPA DID APPLY TO BOTH SIDES. BUT WHAT WE HEARD
11 IN THE EARLIER HEARING IS THAT CIPA ITSELF DOESN'T APPLY AND
12 THAT THE COURT HAS THE AUTHORITY TO SUPPLY OTHER MEASURES.
13 AND THAT'S WHAT THIS WAS INTENDED TO ADDRESS; TO SAY, "YOU SET
14 THE RULES. NOW YOU PLAY WITH THEM. YOU DON'T PICK UP THE
15 PHONE -- WE CAN'T PICK UP THE PHONE AND TALK ABOUT CLASSIFIED
16 INFORMATION. YOU DON'T PICK UP THE PHONE AND TALK ABOUT
17 CLASSIFIED INFORMATION."

18 THE SPECIFIC CONCERN THAT WAS ARTICULATED IN THE
19 HEARING WAS PLACING DOCUMENTS WITHIN -- THAT THEY HAVE
20 NUMEROUS GOVERNMENT FACILITIES. THAT ORDER WAS SPECIFICALLY
21 DRAFTED TO ALLOW THEM TO VIEW DOCUMENTS AT OTHER GOVERNMENT
22 FACILITIES THAT MEET THE REGULATIONS. IT'S NOT JUST A SECURE
23 AREA THAT'S SERVED BY THE COURT SECURITY OFFICER. IT TAKES
24 THE COURT SECURITY OFFICER OUT OF THE EQUATION FOR THEM. AND
25 FOR THOSE REASONS, WE THINK IT'S APPROPRIATE.

COMPUTER-AIDED TRANSCRIPTION

1 MR. HALPERN: AGAIN, MR. DOBER JUST MISSED THE
2 ENTIRE POINT. WE DON'T NEED A COURT SECURITY OFFICER. WE
3 ALREADY HAVE A COURT SECURITY OFFICER. THERE'S SOMEBODY
4 DESIGNATED IN OUR OFFICE TO SERVE THAT EXACT FUNCTION. HE
5 MAINTAINS CONTROL OVER THE SKIFF. HE MAKES SURE EVERYTHING IS
6 KEPT IN THE RIGHT FRAMEWORK. WHAT HE'S SUGGESTING IS THE
7 DUPLICATIVE FRAMEWORK THAT CLEARLY HAS NO PURPOSE WHATSOEVER
8 IN THIS CONTEXT.

9 THE COURT: I AGREE. I CONFIRM AND AFFIRM MY
10 ORIGINAL DECISION. THE THIRD PROTECTIVE ORDER WILL NOT ISSUE.

11 NOW, BEFORE WE LEAVE THIS SUBJECT ENTIRELY,
12 MR. LONDERGAN, I'M REALLY INTERESTED IN A DETERMINATION OF
13 WHETHER THERE MIGHT BE ANOTHER SKIFF AVAILABLE AND WHETHER WE
14 CAN MAKE A SECOND COPY OF THIS TO BE PLACED IN A SKIFF IN THE
15 EASTERN DISTRICT OF VIRGINIA OR SOMEWHERE CLOSE BY.

16 WILL YOU LOOK INTO THAT AND REPORT BACK TO ME?

17 MR. LONDERGAN: YES, YOUR HONOR.

18 THE COURT: I TAKE YOUR POINT THAT THERE MAY BE SOME
19 MATERIAL THAT'S SO CLASSIFIED THAT THEY ONLY WANT ONE COPY
20 AND ONE COPY ONLY. AND IF THAT'S THE CASE, THEN MAYBE
21 MR. MAC DOUGALL AND CO-COUNSEL MAY HAVE TO TRAVEL HERE TO LOOK
22 AT IT. BUT IF IT'S NOT THE CASE FOR THE GREAT BULK OF IT AND
23 NO ONE HAS HEARTBURN OVER HAVING A SECOND COPY KEPT IN A
24 SECURE FACILITY, A FULLY SECURE FACILITY, TO FACILITATE REVIEW
25 BY COUNSEL AND FOR THEIR CONVENIENCE, THEN I'D APPRECIATE YOU

1 DOING THAT. THAT WAS PART OF WHAT INFORMED MY DECISION ON THE
2 DENIAL OF THE MOTION FOR VENUE TRANSFER.

3 MR. LONDERGAN: LOOKING DOWN THE ROAD A PIECE, THE
4 COMPLICATION COMES WHEN IT'S NOT BEEN FILED CLASSIFIED. THE
5 CLASSIFIED FILINGS OF VENUE IS HERE AND FILINGS ARE HERE.
6 WHEN IT COMES TO THAT PARTICULAR POINT, THEN THE FILES WOULD
7 NEED TO BE PREPARED HERE.

8 THE COURT: WELL, WE'LL CROSS THAT BRIDGE.

9 YOU'VE TOLD ME NOW IN THE INTERIM THAT SOME ACCESS
10 HAS BEEN AVAILABLE TO MR. FOGGO'S COUNSEL THROUGH YOUR OWN
11 EFFORTS ON THESE CD'S THAT HAVE BEEN PREPARED THUS FAR?

12 MR. LONDERGAN: YES, YOUR HONOR. THERE'S A SEALED
13 PACKAGE WHICH CONTAINS SOME DISKS WITH CLASSIFIED INFORMATION
14 WHICH HAS BEEN AVAILABLE IN A SKIFF FOR THE CLEARED MEMBERS OF
15 THE FOGGO DEFENSE TEAM TO REVIEW.

16 THE COURT: TO THE EXTENT THAT WE CAN EXPAND THAT
17 ARRANGEMENT SO AS TO AVOID UNWARRANTED UNNECESSARY TRAVEL
18 HERE, I WOULD APPRECIATE IT. MAYBE YOU CAN KEEP ME INFORMED
19 AS TO WHAT EFFORTS CAN BE MADE OR MAYBE IT'S IMPOSSIBLE
20 IN SOME INSTANCES.

21 MR. LONDERGAN: YES, SIR.

22 THE COURT: LET ME TURN NOW BACK TO THE CASE
23 INVOLVING MR. WILKES AND MR. MICHAEL. WE'VE JUMPED AROUND.

24 MR. GRANGER, YOU HAVE A MOTION TO CONTINUE THE
25 MOTION HEARING. I UNDERSTAND YOU'RE RECENTLY TO THE CASE.

1 I'M INCLINED TO GIVE YOU TIME TO GET UP TO SPEED AND
2 FILE APPROPRIATE MOTIONS AS IT AFFECTS MR. MICHAEL, BUT I'M
3 ALSO INTENT ON SETTING A TRIAL DATE IN THE CASE TODAY NOT NEXT
4 MONTH, BUT THE MONTH AFTER. BUT I HAVE IN MIND THAT THE
5 WILKES/MICHAEL CASE WILL GO FIRST. I HAVE IN MIND THAT WE'RE
6 GOING TO TRY THAT CASE MID-AUGUST. SO WITH THAT IN MIND, I'M
7 HAPPY TO HEAR FROM YOU.

8 MR. GRANGER: YOUR HONOR, JUST A FEW PRELIMINARY
9 MATTERS. I WANT TO ECHO MR. MAC DOUGALL'S SENTIMENT. WE
10 APPRECIATE HOW WE OUT-OF-TOWNSERS HAVE BEEN TREATED.

11 YOUR HONOR, I DO WANT TO POINT OUT WITH RESPECT TO
12 MY MOTION THAT THE GOVERNMENT DID NOT OPPOSE THE SECOND BASIS
13 FOR MY MOTION THAT UNLESS MORE TIME IS GRANTED, MR. MICHAEL'S
14 COUNSEL CANNOT EFFECTIVELY PREPARE FOR TRIAL. AND I
15 EMPHASIZE -- I DON'T WANT TO REPEAT ALL THE DETAILS IN MY
16 PAPERS -- THE AMOUNT OF DISCOVERY IS TRULY EXTRAORDINARY. AND
17 IF THE PAPER AND, FOR LACK OF A BETTER WORD, "ELECTRONIC"
18 PAPER WEREN'T VOLUMINOUS ENOUGH, IF YOU INCLUDE CPU'S AND HARD
19 DISKS, I'M LOOKING AT SOME 150 COMPUTERS.

20 THERE ARE SPECIFIC STRATEGIC REASONS WHY IT'S
21 IMPORTANT FOR ME TO GO THROUGH AS MUCH OF THAT AS POSSIBLE. I
22 COULD EXPLAIN THAT TO YOUR HONOR IN LITERALLY LESS THAN A
23 MINUTE. I JUST WOULDN'T WANT TO DO THAT IN OPEN COURT. I'D
24 BE HAPPY TO DO THAT IN A BRIEF SEALED PROCEEDING.

25 THE COURT: ACTUALLY, IT'S EVIDENT TO ME WHY YOU'D

COMPUTER-AIDED TRANSCRIPTION

1 WANT TO DO THAT. I UNDERSTAND THAT YOU WANT TO BE UP TO SPEED
2 WITH ALL ASPECTS OF THE DISCOVERY.

3 BUT WHAT I'M TALKING ABOUT IS A TRIAL DATE THREE
4 MONTHS FROM NOW. ROUGHLY THREE MONTHS. I'M TALKING ABOUT THE
5 SECOND WEEK OF AUGUST. SO JUNE, JULY, AND THEN INTO AUGUST.

6 MR. GRANGER: THE INFORMATION IS THAT VOLUMINOUS.

7 I ALSO WANTED TO MAKE A COMMENT WITH RESPECT TO
8 SOMETHING THAT WAS SAID IN THE GOVERNMENT'S MOTION THAT I
9 THINK IS WORTH BRINGING TO THE COURT'S ATTENTION.

10 AT PAGE 5 OF THE GOVERNMENT'S MOTION PAPERS -- AND I
11 DON'T KNOW IF THIS IS PLAYING ANY ROLE IN HOW YOUR HONOR IS
12 EVALUATING THIS ISSUE, BUT THERE'S A REFERENCE ON
13 APPROXIMATELY LINES 18 TO 19 -- AND I'LL READ FROM THE
14 GOVERNMENT'S PAPERS -- "DEFENDANT'S NEW COUNSEL URGED THE
15 GOVERNMENT TO DELAY THE PURSUIT OF SPECIFICALLY GOING INTO ANY
16 CHARGES." THAT'S NOT TRUE. NEITHER I NOR MR. LEVITT NOR
17 MR. FRANK EVER REQUESTED ANY DELAY IN THE SUPERSIDING CHARGES.
18 I DON'T DISPUTE THE GOVERNMENT'S ACCOUNT THAT PRIOR COUNSEL
19 MIGHT HAVE DISCUSSED THAT, BUT I DID NOT. AND I DO WANT TO
20 POINT THAT OUT. I DON'T THINK THAT SHOULD HAVE BEEN IN THERE.

21 THE COURT: NO, THAT HAD NO EFFECT ON MY JUDGMENT OF
22 WHAT WOULD BE AN APPROPRIATE TIME FOR THE CASE TO PROCEED.

23 MR. GRANGER: THANK YOU, JUDGE.

24 WITH RESPECT TO THE OBTAINING OF INFORMATION, I'LL
25 GIVE YOU AN EXAMPLE OF SOME OF THE DIFFICULTIES WE'RE HAVING.

1 THE DAY AFTER THE APRIL 2ND HEARING, YOUR HONOR, I
2 SPENT THE DAY GOING THROUGH INFORMATION AT THE U.S. ATTORNEY'S
3 OFFICE HERE. UNFORTUNATELY, THERE WAS SOME MIX-UP, AND I WAS
4 NOT ABLE TO SEE ANY DOCUMENTS AT THE FBI OFFICES.

5 IT TOOK APPROXIMATELY A MONTH FOR THE GOVERNMENT TO
6 GET THOSE MATERIALS COPIED TO ME. I DON'T CRITICIZE THE
7 GOVERNMENT FOR THAT. IT WAS NOT EASY TO DO, ESPECIALLY THE
8 ELECTRONIC MATERIALS. BUT IT TOOK A MONTH TO SIMPLY GET THE
9 INFORMATION WE HAD CALLED FOR, I THINK APPROXIMATELY 13 BOXES.

10 TOMORROW, I'VE MADE ARRANGEMENTS. THE FBI HAS BEEN
11 EXTREMELY HELPFUL. I APPRECIATE IT. THEY'RE GOING TO PULL
12 DOCUMENTS THAT WE HAD DESIGNATED FROM VARIOUS SEARCH WARRANT
13 RETURNS, AND THEY'VE TOLD ME THAT THEY'RE SPREAD OUT AMONG
14 SOME 150 BOXES. WE'VE GOT TO GO THROUGH IT.

15 WE TRIED TO GET A COMMERCIAL COPYING SERVICE IN TO
16 LOOK THROUGH IT AND COPY THEM. WE SENT THEM THE MATERIALS.
17 THEY PROMPTLY CALLED US BACK AND SAID, "WE CAN'T GIVE -- IT
18 WOULD BE AN EXTRAORDINARY EFFORT ON OUR PART AND VERY
19 EXPENSIVE FOR YOU IF WE HAVE TO GO ON SITE AND TRY TO FIND
20 THESE DOCUMENTS." SO WE'VE MADE ARRANGEMENTS TO COME OUT AND
21 DO THAT OURSELVES.

22 YOU MAY RECALL AT THE APRIL 2ND HEARING, YOUR HONOR
23 SUGGESTED TO THE GOVERNMENT TO MOVE THINGS ALONG THAT THE
24 GOVERNMENT CONSIDER EARLY DISCLOSURE OF 3500 MATERIALS.
25 MR. HALPERN SAID HE WOULD TAKE THAT UNDER ADVISEMENT. THREE

1 DAYS LATER, WE GOT A LETTER FROM THE GOVERNMENT SAYING, "WE'RE
2 GOING TO DO THAT. WE'RE GOING TO PRODUCE 3500 MATERIAL ON A
3 ROLLING BASIS OVER" -- I BELIEVE THE TIME FRAME WAS THE NEXT
4 TWO WEEKS. AT THE TIME THAT REPRESENTATION HAD BEEN MADE, WE
5 HAD THE GRAND JURY TRANSCRIPT OF MR. MICHAEL'S TESTIMONY, AND
6 WE HAD THE SEARCH WARRANTS AFFIDAVITS.

7 WE HAVEN'T GOTTEN ANYTHING SINCE. I DON'T KNOW WHY
8 THAT'S THE CASE, BUT WE HAVEN'T GOTTEN ANYTHING. I MENTION
9 THAT BECAUSE SIMPLY THE PRODUCTION OF MATERIALS SEEMS TO BE
10 TAKING ITS OWN COURSE.

11 I WILL BE HERE WHENEVER YOUR HONOR TELLS ME TO TRY
12 THIS CASE, BUT I ALSO MENTIONED THAT A MID-AUGUST TRIAL MEANS
13 I'M NOT -- I HAD PLANS TO BE OUT OF THE COUNTRY. I'LL CANCEL
14 THEM IF I HAVE TO.

15 THE COURT: WHEN DO YOU PLAN TO BE OUT OF THE
16 COUNTRY?

17 MR. GRANGER: SEPTEMBER 3RD THROUGH SEPTEMBER 10TH.
18 I KNOW THAT MY LOCAL COUNSEL'S NOT AVAILABLE TO ME JULY 25TH
19 THROUGH ABOUT THE FIRST WEEK IN AUGUST. AND NORMALLY, THREE
20 MONTHS TO PREPARE WOULD BE A LONG TIME, YOUR HONOR. I ASSURE
21 YOU WE ARE WORKING VERY, VERY HARD. BUT THERE IS JUST A
22 VOLUMINOUS AMOUNT OF MATERIAL.

23 THE COURT: IS THERE A PROSPECT, MR. GRANGER, YOU
24 COULD -- I DON'T WANT YOU TO -- IF YOU PAID FOR A VACATION OR
25 SOMETHING LIKE THAT, I DON'T WANT YOU TO LOSE IT ALTOGETHER.

COMPUTER-AIDED TRANSCRIPTION

1 IS THERE A PROSPECT THAT POSSIBLY YOU COULD MOVE YOUR
2 SEPTEMBER 3RD THROUGH 10TH PLANS? CAN YOU MOVE THOSE BACK?

3 MR. GRANGER: THERE'S ABOUT 25 OTHER PEOPLE
4 INVOLVED, LITERALLY.

5 THE COURT: MR. GERAGOS, I KNOW YOU'RE GOING TO BE
6 IN TRIAL.

7 MR. GERAGOS: THE TRIAL THAT WAS SCHEDULED IN THE
8 EASTERN DISTRICT OF PENNSYLVANIA WAS MOVED FROM JUNE 11TH --
9 I WAS JUST THERE LAST WEEK. JUDGE KAUFFMAN MOVED IT TO JULY
10 9TH. I THEN RECEIVED -- WHEN I WAS OUT OF THE COUNTRY
11 ACTUALLY IN CONNECTION WITH THAT CASE SETTING UP RULE 15'S, I
12 RECEIVED A CALL SAYING THAT IT WAS BEING MOVED TO JULY 16TH.
13 AND THE TERM THEY USED IS THAT "YOU'VE BEEN ATTACHED," WHICH
14 THEY APPARENTLY USE IN THAT DISTRICT WITH GREAT FREQUENCY.

15 THAT CASE REQUIRES ME TO GO TO MOLDOVO, ROMANIA AND
16 POTENTIALLY CUBA IN ORDER TO DO THE RULE 15 DEPOSITIONS PRIOR
17 TO THAT TRIAL. I HAVE TWO OTHER TRIALS TO DO BEFORE THEN. SO
18 I'M LOCKED UP LITERALLY THROUGH MID- TO END OF AUGUST, AND
19 THAT'S PUSHING ALL THE VARIOUS STATE CASES ASIDE.

20 THE COURT: I'M TALKING ABOUT MID- TO LATE AUGUST.
21 I UNDERSTAND YOU'RE GOING TO BE MOVING FROM ONE TRIAL TO THE
22 OTHER. FRANKLY, I DON'T KNOW HOW YOU'RE GOING TO GET
23 GOVERNMENT LICENSES TO GO OVER TO SOME OF THOSE PLACES IN
24 CONNECTION WITH YOUR JULY 16TH TRIAL DATE.

25 MR. GERAGOS: NEITHER DO I, AND THAT'S ONE OF THE

1 REASONS THAT WE HAVE A PENDING MOTION TO DISMISS IN THAT
2 JURISDICTION AS WELL.

3 THE COURT: BUT IT SOUNDS LIKE MAYBE LATER AUGUST
4 WOULD WORK FOR YOU. I'D LIKE TO ACCOMMODATE MR. GRANGER.

5 LET ME TELL THE PROBLEM THAT I AM FACED WITH. AND
6 IT'S NOT YOUR PROBLEM. IT'S MINE. BUT I HAVE TO ACCOMMODATE
7 IT.

8 I HAVE THIS CASE, AND THEN I'LL HAVE MR. WILKES AND
9 MR. FOGGO'S CASE TO FOLLOW. THAT'S MY INTENTION. THEN I HAVE
10 ANOTHER LARGE CASE THAT STARTS IN JANUARY THAT'S BEEN PRE-SET.
11 AND I'VE REMINDED THE LAWYERS AT EACH JUNCTURE WE'RE GOING IN
12 JANUARY. IT'S, AT THIS POINT, A DEATH PENALTY CASE.

13 SO I'VE GOT TO GET THESE CASES TRIED SOMETIME
14 BETWEEN NOW AND DECEMBER.

15 MR. GRANGER: IS AN OCTOBER OR NOVEMBER DATE
16 POSSIBLE?

17 THE COURT: I THINK THAT'S TOO LATE. THAT WOULD NOT
18 GIVE ME ENOUGH TIME, I DON'T THINK. I'VE LOOKED AT THE
19 INDICTMENTS IN BOTH CASES. I DON'T THINK THAT WOULD GIVE ME
20 ENOUGH TIME TO GET BOTH CASES TRIED BY THE END OF THE YEAR.
21 THAT'S MY FIRM INTENTION TO DO THAT.

22 NOW, CAN I ADJUST THIS A LITTLE BIT? CAN I PUT IT
23 AFTER YOU GET BACK ON SEPTEMBER 10TH? I DON'T KNOW IF YOU
24 WANT TO COME RIGHT BACK FROM VACATION AND GO INTO TRIAL.
25 MAYBE YOU CAN TAKE SOME STUFF WITH YOU.

1 BUT WE'VE GOT TO GET A JUMP ON THIS, MR.
2 GRANGER, RIGHT AWAY AFTER YOU GET BACK IF I GO OUT THAT FAR.
3 AND MR. GERAGOS HERE, HE'S SIGNING UP FOR NEW STUFF ALL THE
4 TIME. SO I WANT TO GET MY ATTACHMENT CLAWS INTO HIM, TOO.
5 THAT'S GOING TO GET NAILED DOWN TODAY.

6 MR. GERAGOS: I'M LOCKING HARD FOR SEPTEMBER.

7 THE COURT: YOU NEED TO TELL ANY SUBSEQUENT JUDGE
8 "LOOK, I'M GOING TO BE IN CONTEMPT IF I DON'T SHOW UP ON THIS
9 DATE." THIS IS A FIRM DATE THAT I'VE AGREED TO, AND THE JUDGE
10 IS RESOLUTE ABOUT THIS.

11 MR. GERAGOS: THAT'S FINE.

12 THE COURT: WELL, WITH THAT SAID, MR. GRANGER, I'LL
13 ACCOMMODATE YOU.

14 WHAT IF WE'RE TO START THE 18TH? THAT WILL GIVE YOU
15 A WEEK TO CATCH YOUR BREATH.

16 MR. GRANGER: I'LL BE HERE.

17 THE COURT: MR. GERAGOS, THE 18TH OF SEPTEMBER?

18 MR. GERAGOS: YES, SIR.

19 THE COURT: THIS ISN'T LIKE STATE COURT. AS YOU
20 KNOW, THERE'S NO TRIAL CALL. WE GO ON THE 18TH.

21 MR. GRANGER: JUDGE, COULD WE INQUIRE AS TO WHEN WE
22 MIGHT BE GETTING THAT 3500 MATERIAL?

23 THE COURT: MR. HALPERN, HOW ABOUT THAT? I SAW SOME
24 CORRESPONDENCE WHERE YOU WERE JOCKEYING BACK AND FORTH ABOUT
25 RECIPROCAL DISCOVERY, BUT I DON'T THINK IT WAS WITH

1 MR. GRANGER, WAS IT?

2 MR. FORGE: NO, I DON'T THINK IT WAS, YOUR HONOR.

3 YOUR HONOR, WE WILL -- GIVEN COUNSEL'S COMMITMENT TO
4 GO TO TRIAL ON SEPTEMBER 18TH, THAT WAS OUR CONCERN. OUR
5 CONCERN WAS THAT WE ARE GOING TO CONTINUE TO PUSH THIS THING
6 OUT. GIVEN COUNSEL'S COMMITMENT TO BE READY TO GO ON THE
7 18TH, WE WILL PROVIDE EXPANSIVE JENCKS PRODUCTION.

8 THE COURT: RIGHT NOW? YOU'LL START RIGHT AWAY?

9 MR. FORGE: WE'LL DO IT 70 DAYS IN ADVANCE.

10 WHAT DOES THAT WORK OUT TO BE?

11 THE COURT: I DON'T KNOW.

12 WHY DON'T YOU GIVE IT TO THEM NOW SO THEY CAN
13 PREPARE? IF IT'S NOT STUFF THAT IMPLICATES WITNESS SECURITY,
14 MR. FORGE, YOU KNOW, I DON'T GET THAT. I UNDERSTAND YOU HAVE
15 THE RIGHT UNDER THE RULE. THIS FELLOW IS GOING TO HAVE TO
16 WORK LIKE A BANSHEE TO BE PREPARED. HE'S LATE INTO THE CASE.
17 SO GIVE HIM THE STUFF OVER.

18 MR. FORGE: I THINK WE'RE TALKING -- JUNE 1ST WOULD
19 BE EVEN MORE THAN 70 DAYS. WE'RE ONLY TWO WEEKS BEFORE THAT.
20 SO --

21 THE COURT: SO GIVE HIM THE STUFF TOMORROW.

22 MR. FORGE: WE'LL TURN IT OVER. WITH THE COURT'S
23 CONTEMPT ORDER HANGING OVER ANYBODY'S HEAD --

24 THE COURT: IT'S NOT THAT. LOOK, FIRST OF ALL, I
25 UNDERSTAND I HAVE NO AUTHORITY TO ORDER YOU TO DO IT. BUT

1 HAVING SAID THAT, ALL THREE OF YOU ARE VERY EXPERIENCED. AND
2 THE CONVENTION IN THIS DISTRICT HAS NOT BEEN TO HANG ONTO
3 WITNESS STATEMENTS UNTIL AFTER THE WITNESS HAS TESTIFIED ON
4 DIRECT. IT HASN'T BEEN LIKE THAT FOR A LONG TIME.

5 ARE THERE SITUATIONS WHERE THAT'S CALLED FOR? SURE.
6 I'VE HAD SITUATIONS LIKE THAT WHEN I WAS A LAWYER WHERE
7 SOMEBODY'S SAFETY WAS IMPLICATED, AND I DIDN'T WANT TO
8 JEOPARDIZE THAT. I HAVEN'T HEARD ANY OF THAT HERE. I
9 UNDERSTAND IT'S A BIG CASE, BUT LET THEM BE PREPARED FOR THIS.

10 MR. FORGE: WE'LL PROVIDE IT.

11 JUST SO YOU KNOW, JUST SO YOU DON'T THINK I'M
12 STICKING TO A RULE WITHOUT -- OR A POLICY WITHOUT ANY THINKING
13 BEHIND IT, THERE ARE OBSTRUCTION CHARGES HERE. THERE ARE
14 OTHER PEOPLE THAT WERE ALLEGEDLY INVOLVED BY MR. MICHAEL IN
15 TERMS OF HIS OBSTRUCTION. SO IT'S NOT AS IF THIS IS JUST A
16 STRAIGHTFORWARD CASE WHERE THERE'S NO CONCERN WHATSOEVER THAT
17 DOCUMENTS AND WITNESSES --

18 THE COURT: I THINK MR. MICHAEL WELL KNOWS NOW THE
19 LAST THING HE OUGHT TO BE DOING IS ANYTHING THAT ANYBODY COULD
20 POSSIBLY CHARACTERIZE AS POTENTIALLY AN OBSTRUCTION OF
21 JUSTICE. GIVE HIM THE STUFF OVER. MR. GERAGOS, TOO. BECAUSE
22 HE'S GOING TO BE READY ON THE 18TH JUST LIKE MR. GRANGER.

23 MR. FRANK, YOU'LL BE BACK THEN?

24 MR. FRANK: YES.

25 THE COURT: THAT CASE IS SET.

1 IS THERE ANYTHING ELSE I NEED TO DO ON IT? YOU WANT
2 MEET TO SET AN INTERMEDIATE DATE FOR HEARING ANY MOTIONS THAT
3 YOU THINK ARE APPROPRIATE OR OUGHT TO BE BROUGHT ONCE YOU
4 BECOME MORE FAMILIAR WITH THE ENTIRETY OF THE DISCOVERY?

5 MR. GRANGER: NOT AT THIS TIME, JUDGE. WE'LL
6 ADDRESS THAT IN OUR PAPERS.

7 NOT TO BE TOO PICKY, I THINK I UNDERSTOOD
8 MR. FORGE'S POSITION TO EVOLVE FROM THE BEGINNING OF HIS
9 COMMENTS. WE'RE GOING TO GET -- I THINK WE WENT FROM
10 EXPANSIVE 3500 TO COMPLETE?

11 MR. FORGE: WE WILL PROVIDE MORE THAN THEY'RE
12 ENTITLED UNDER THE JENCKS ACT. YOUR HONOR IS VERY FAMILIAR
13 WITH THE DEFINITION OF WITNESS STATEMENTS UNDER THE JENCKS
14 ACT. I'M SURE MR. GRANGER IS AS WELL. WE'LL GIVE THEM MORE
15 THAN WHAT THEY'RE ENTITLED TO.

16 THE COURT: IF THE DISTINCTION IS ON WITNESS NOTES,
17 AGENTS' NOTES, I DON'T REQUIRE THEM TO TURN THAT OVER.
18 FREQUENTLY, THOSE NOTES ARE A MIX OF IMPRESSIONS AND VERBATIM
19 STATEMENTS AND THE LIKE. THAT'S WHAT I'M TALKING ABOUT.
20 ANYTHING THAT'S MADE ITS WAY INTO A FORMAL REPORT THAT
21 CONTAINS WITNESS STATEMENTS, I WANTS YOU AND MR. GERAGOS TO
22 HAVE THAT.

23 BY THE END OF THIS WEEK?

24 MR. FORGE: WE'LL CERTAINLY START PRODUCING THAT BY
25 THE END OF THIS WEEK. THEY'LL HAVE EVERYTHING THAT WE HAVE

1 WITHIN THE NEXT WEEK AND A HALF.

2 THE COURT: THAT'S PRETTY FIRM, MR. GRANGER. WITHIN
3 A WEEK AND HALF, YOU'LL HAVE THE INDICATED JENCKS MATERIAL.

4 MR. GERAGOS: ELECTRONICALLY?

5 MR. FORGE: I CAN'T SAY WHETHER IT'S ALL GOING TO BE
6 ELECTRONIC OR NOT. MR. GERAGOS WOULD LIKE ME TO HAND-DELIVER
7 IT. THAT MIGHT BE A PROBLEM.

8 MR. GERAGOS: I'LL COME AND PICK IT UP IF IT'S
9 ELECTRONIC.

10 MR. FORGE: WE'LL GIVE IT TO THEM. IF WE HAVE IT
11 AVAILABLE IN ELECTRONIC FORMAT, THEY'LL GET IT IN ELECTRONIC
12 FORMAT.

13 THE COURT: YOU MIGHT HAVE TO SEND IT TO CUBA.

14 MR. GRANGER: LASTLY, JUDGE, TO THE EXTENT ANY NEW
15 3500 MATERIAL IS GENERATED, THAT THE GOVERNMENT TRY AS SOON AS
16 POSSIBLE --

17 THE COURT: YOU'LL DO THAT; RIGHT? YOU'LL ACCEDE TO
18 A ROLLING OBLIGATION?

19 MR. FORGE: ABSOLUTELY.

20 THE COURT: LET ME SET A MOTIONS IN LIMINE DATE AS
21 WELL.

22 DO YOU ANTICIPATE THAT THERE ARE GOING TO BE COMPLEX
23 MOTIONS IN LIMINE IN THIS CASE?

24 MR. FORGE: NO, I DON'T THINK THERE ARE MANY
25 COMPLICATED ISSUES.

1 THE COURT: I'LL TELL YOU WHAT, I'LL SET IT -- I'M
2 JAMMED HERE A LITTLE BIT. I'D ORDINARILY SET IT THE DAY
3 BEFORE, MR. GRANGER. I DON'T WANT TO SET IT ON THE 10TH
4 BECAUSE THAT'S WHEN YOU'RE COMING BACK. I CAN SET IT ON THE
5 14TH.

6 DO YOU INTEND TO BE IN TOWN THE WEEKEND BEFORE THE
7 TRIAL WOULD START? OR I'LL PUT IT ON MONDAY THE 17TH UNLESS
8 YOU DON'T THINK THAT WILL LEAVE ENOUGH TIME.

9 MR. GRANGER: MAY I HAVE ONE MOMENT, YOUR HONOR?

10 THE COURT: SURE.

11 (PAUSE IN PROCEEDINGS)

12 MR. GRANGER: YOUR INCLINATION WAS THE 14TH?

13 THE COURT: I CAN DO THAT. THAT'S A FRIDAY. THAT
14 PRESUMES THAT YOU'LL COME INTO TOWN THE WEEKEND BEFORE THE
15 TRIAL STARTS, AND I CAN HEAR MOTIONS IN LIMINE ON THE 14TH.
16 OTHERWISE, I'LL CLEAR THE AFTERNOON OF THE 17TH, WHICH WOULD
17 BE MONDAY AFTERNOON. I'LL HEAR AND DECIDE MOTIONS IN LIMINE
18 ON MONDAY AFTERNOON. WE'LL START WITH JURY SELECTION ON THE
19 MORNING OF THE 18TH.

20 MR. GRANGER: WE CAN HAVE THE 17TH.

21 THE COURT: AT 2:00. KEEP THAT CALENDAR CLEAR THAT
22 DAY.

23 MR. FORGE, HOW LONG DO YOU ANTICIPATE IT'S GOING TO
24 TAKE YOU TO PUT YOUR CASE-IN-CHIEF ON?

25 MR. GERAGOS: LAST TIME, THEY SAID FOUR WEEKS.

1 THE COURT: I'VE LOOKED AT THE ALLEGATIONS.

2 MR. FORGE: I THINK WE CAN PUT OUR CASE ON IN THREE
3 WEEKS.

4 THE COURT: TWO, YOU SAID?

5 MR. FORGE: I DIDN'T SAY FOUR. I SAID THREE.

6 THE COURT: WELL, OKAY. THAT WOULD BE THE OUTSIDE,
7 I WOULD THINK.

8 MR. FORGE: WE'RE PRETTY EFFICIENT. THAT WILL BE
9 THE OUTSIDES. OF COURSE, IT DEPENDS ON THE
10 CROSS-EXAMINATIONS. I KNOW COUNSEL HERE WILL PROBABLY HAVE
11 LENGTHY CROSS-EXAMINATIONS. SO IT COULD BE --

12 THE COURT: WELL, WE HAVE EXPERIENCED LAWYERS WHO
13 I'M SURE WILL CUT TO THE CHASE. I'M GOING TO ANTICIPATE
14 PROBABLY TWO, TWO AND A HALF WEEKS FOR THE GOVERNMENT'S
15 CASE-IN-CHIEF.

16 NOW, ONE LAST QUESTION. THIS CASE HAS HAD SOME
17 PUBLIC ATTENTION HERE IN SAN DIEGO. IF THERE IS ANY REQUEST
18 FOR ANY KIND OF PRE-SCREENING OF THE JURY, I WANT THAT TO BE
19 FILED WELL IN ADVANCE SO THAT I CAN ACT ON THAT AND, IF
20 APPROPRIATE, TAKE MEASURES THAT ARE REQUESTED. BY NO LATER
21 THAN JULY 16TH, I WANT ANYONE WHO'S SO INCLINED TO FILE A
22 MOTION ON WHAT PROCEDURES, IF ANY, MIGHT BE APPROPRIATE WITH
23 RESPECT TO JURY SELECTION HERE. SPECIFICALLY, MR. GERAGOS AND
24 MR. GRANGER, IF YOU ENVISION SOME KIND OF JURY QUESTIONNAIRE.

25 MR. GERAGOS: I DO.

1 THE COURT: THAT NEEDS TO BE FILED WITH ME SO THAT
2 WE CAN GET IT OUT AND HAVE A PANEL READY TO GO, PRE-SCREENED,
3 AND HAVE TIME TO GET THE RESPONSES BACK AND GO OVER THEM WITH
4 COUNSEL.

5 NOW, LET ME -- BEFORE WE END, MR. MAC DOUGALL, MY
6 INCLINATION IS TO HAVE THIS CASE TRAIL, THE FIRST ONE, THE
7 WILKES/MICHAEL CASE, AND TRY THIS CASE ON THE HEELS OF THE
8 OTHER ONE. MAYBE A WEEK BREAK, SOMETHING LIKE THAT.

9 I UNDERSTAND WE'RE GOING TO HAVE SOME OTHER WORK TO
10 DO IN BETWEEN NOW AND THEN, IN PARTICULAR THE CIPA
11 DETERMINATIONS AND THAT THERE WAS AN INDICATION THAT THERE
12 WILL BE A MOTION FOR SEVERANCE. I'M NOT GOING TO FORECLOSE
13 ANY OF THAT.

14 I WANT TO GIVE YOU A TENTATIVE IDEA THAT MY PLAN IS
15 WITHIN A WEEK OF COMPLETING THE TRIAL IN MR. WILKES'S AND
16 MR. MICHAEL'S CASE, IT BE WOULD MY INTENTION TO IMPANEL A JURY
17 I'M ASSUMING NOW SOMETIME MID-OCTOBER AND TRY THE SECOND CASE
18 INVOLVING MR. FOGGO.

19 DO YOU HAVE ANY PRELIMINARY THOUGHTS ON THAT?

20 MR. MAC DOUGALL: I AGREE WITH THE COURT THAT THERE
21 ARE LIKELY TO BE ISSUES INVOLVING CIPA, PARTICULARLY GIVEN THE
22 NEW ALLEGATIONS IN THE SUPERSEDED INDICTMENT.

23 IN THAT REGARD, YOUR HONOR, YOU MADE SOME REFERENCE
24 TO CORRESPONDENCE BACK AND FORTH. I DON'T HAVE THE
25 TRANSCRIPT, SO THIS IS GOING TO BE ORAL HISTORY.

COMPUTER-AIDED TRANSCRIPTION

1 WHEN WE WERE HERE APRIL 2ND, MY RECOLLECTION, AS WE
2 WERE ARGUING THE RULE 16 MOTION AND THE MOTION FOR A BILL OF
3 PARTICULARS, THAT IN CONSIDERATION OF MR. GERAGOS AND I
4 WITHDRAWING OUR MOTIONS, THAT THE GOVERNMENT AGREED,
5 MR. HALPERN, SUBJECT TO CONSULTATION WITH HIS COLLEAGUES, TO
6 DO EARLY PRODUCTION OF JENCKS, BRADY, GIGLIO, AND SO FORTH. I
7 WON'T BORE THE COURT WITH THE SERIES OF LETTERS THAT WENT BACK
8 AND FORTH, BUT --

9 THE COURT: I SAW ONE OR TWO.

10 THEY WANT YOU TO RECIPROcate?

11 MR. MAC DOUGALL: YES. AND I RESPONDED TO THAT AND
12 SAID, "WE HEREBY RECIPROcate, BUT WE DON'T HAVE," AND WE
13 TRUTHFULLY DO NOT HAVE, "ANY RULE 16(B) MATERIAL AT THIS
14 POINT." OBVIOUSLY, IT'S A ROLLING OBLIGATION AS WE ACQUIRE IT
15 TO TURN IT OVER.

16 I GOT A LETTER ON FRIDAY SAYING, "THANK YOU. THAT'S
17 VERY NICE. BUT WE'LL GIVE IT TO YOU 70 DAYS IN ADVANCE OF
18 TRIAL."

19 THE COURT: MR. HALPERN?

20 MR. FORGE: SAME ISSUE, YOUR HONOR. IF THEY COMMIT
21 TO A TRIAL DATE, THEN FINE, WE'LL TURN IT OVER. BUT UNTIL WE
22 GET A FIRM COMMITMENT FROM COUNSEL THEY WILL BE AVAILABLE AND
23 READY TO PROCEED TO TRIAL --

24 THE COURT: I HAVE SET THIS FIRST CASE NOW,
25 MR. MAC DOUGALL, FOR SEPTEMBER 18TH. LET'S ASSUME THAT IT

1 TAKES A MONTH. I WOULD BE PREPARED TO START ON THE SECOND
2 CASE ON OR ABOUT OCTOBER 16TH.

3 HAVE YOU HAD A CHANCE TO LOOK AT YOUR SCHEDULE AND
4 WILL YOU BE AVAILABLE ASSUMING ALL THE OTHER WORK GETS DONE
5 BETWEEN NOW AND THEN, THE CIPA DETERMINATIONS THE COURT RULES
6 ON AND ANY OTHER MOTIONS?

7 MR. FORGE: I'LL CHECK WITH CO-COUNSEL.

8 THE COURT: TAKE A MINUTE AND CHECK. I THINK
9 MR. DOBER IS SHOOTING YOU A NOTE.

10 (PAUSE IN PROCEEDINGS)

11 MR. MAC DOUGALL: THAT DATE IS NOT A PROBLEM.
12 HOWEVER, AS THE COURT POINTED OUT, THERE'S A BIG BUT. WE
13 HAVEN'T EVEN RECEIVED OUR TOP SECRET CLEARANCES YET. ONE OF
14 MY COLLEAGUES HAS ONE FROM A PRIOR JOB THAT'S ALLOWED HIM TO
15 DO A LITTLE BIT MORE IN TERMS OF TALKING TO MR. FOGGO.

16 ALL MY NEIGHBORS HAVE BEEN TALKED TO. MY 7TH GRADE
17 ENGLISH TEACHER CALLED ME AND SAID, "WHAT DID YOU DO? THE FBI
18 IS KNOCKING ON MY DOOR." THAT PROCESS IS OUT OF OUR HANDS.
19 AND WE REALLY -- I'M BEING ABSOLUTELY CANDID WITH THE COURT.
20 WE HAVEN'T BEEN ABLE TO TALK TO MR. FOGGO ABOUT THE GUTS OF
21 THIS CASE YET. WITHOUT THINGS LIKE JENCKS MATERIAL BEING
22 FORTHCOMING, WE'RE GOING TO HAVE TO RE-URGE OUR MOTIONS AGAIN.
23 I'M JUST AFRAID THAT WHATEVER COMMITMENT WE MAKE IS GOING
24 TO --

25 THE COURT: ISN'T PART OF THAT HEALED BY MY GRANTING

COMPUTER-AIDED TRANSCRIPTION

1 YOUR SECOND PROTECTIVE ORDER? I'VE TAKEN THE POSITION THAT
2 I'M NOT GOING TO TRY AND POLICE YOUR DISCUSSIONS WITH
3 MR. FOGGO, THAT THAT'S BETWEEN YOU AND HIM. AND WHATEVER
4 CONTRACT OBLIGATIONS HE HAS WITH THE CIA MAY BIND HIM,
5 ALTHOUGH I THINK HE GETS TO DEFEND HIMSELF AGAINST A CRIMINAL
6 CHARGE BY DISCUSSING RELEVANT MATTERS WITH HIS OWN LAWYERS.

7 SO I DON'T UNDERSTAND HOW ANY OF THAT IS AN
8 IMPEDIMENT PREPARING AT THIS POINT. I DO UNDERSTAND THAT
9 UNTIL YOU GET THAT CLEARANCE, YOU'RE NOT GOING TO HAVE FULL
10 ACCESS TO ALL THE RELEVANT MATERIALS.

11 BUT MR. LONDERGAN, THAT'S FORTHCOMING, ISN'T IT?
12 AREN'T THEY WORKING ON THOSE CLEARANCES FOR MR. FOGGO'S
13 DEFENSE TEAM?

14 MR. LONDERGAN: YES, YOUR HONOR.

15 THE COURT: CAN YOU ASK THEM TO HURRY IT UP? I MEAN
16 THAT RESPECTFULLY, BUT WE NOW HAVE A TRIAL DATE. I DON'T WANT
17 THE TAIL TO WAG THE DOG AND HAVE SOMEBODY COME IN AND SAY, "WE
18 HAVEN'T BEEN ABLE TO TALK TO HIS 4TH GRADE ENGLISH TEACHER, SO
19 YOU'RE GOING TO HAVE TO WAIT ON THIS."

20 MR. GERAGOS: COULD I WEIGH IN ON THIS?

21 THE COURT: YES.

22 MR. GERAGOS: HOW MUCH TIME WERE YOU EXPECTING TO
23 GIVE US BETWEEN THE TWO TRIALS?

24 THE COURT: WELL, THAT WILL DEPEND ON WHAT THE
25 DEFENSE IS. THEY'RE TELLING ME TWO, TWO AND A HALF WEEKS.

1 WE'RE GOING TO START SEPTEMBER 18TH. THAT MEANS WE WOULD
2 CONCLUDE THE GOVERNMENT'S CASE AROUND THE BEGINNING OF
3 OCTOBER. AND I DON'T KNOW AT THIS POINT WHETHER THE DEFENSE
4 WILL PUT ON ANY CASE. IF IT DOESN'T, THEN WE HAVE ABOUT TWO
5 WEEKS, MR. GERAGOS. BUT I'M PUTTING AN ATTACHMENT ON YOU FOR
6 THAT TIME, ALSO.

7 MR. GERAGOS: I DON'T EVER MIND BEING IN SAN DIEGO
8 AT THAT TIME OF YEAR.

9 IS THERE A WAY WE CAN GET A LITTLE MORE TIME BETWEEN
10 THE TWO TRIALS?

11 THE COURT: OCTOBER 23RD?

12 MR. HALPERN: THAT'S WHAT I WAS GOING TO SUGGEST. I
13 THINK THAT WORKS WITH THE COURT'S SCHEDULE BECAUSE THIS TRIAL
14 IS A BIT SHORTER. I CERTAINLY THINK WE CAN PUT ON OUR CASE IN
15 TWO WEEKS.

16 THE COURT: THE WILKES/MICHAEL CASE?

17 MR. HALPERN: NO. THE WILKES/FOGGO CASE. THAT'S
18 THE SHORTER TRIAL.

19 THE COURT: THE 23RD, MR. GERAGOS? THAT WILL GIVE
20 YOU SOME BREATHING OPPORTUNITY.

21 MR. GERAGOS: YES.

22 THE COURT: WILL THAT WORK FOR YOU, MR. MAC DOUGALL?

23 MR. MAC DOUGALL: YES.

24 THE COURT: I'LL DO MY BEST, AND YOU CAN FILE ANY
25 EX PARTE REQUESTS THAT YOU THINK ARE APPROPRIATE TO HELP

1 EXPEDITE THIS. THE GOVERNMENT NOW TELLS ME THAT THEY'RE GOING
2 TO HONOR THE COMMITMENT THAT THEY'VE MADE TO OTHER COUNSEL TO
3 GIVE YOU THE JENCKS MATERIAL. SO I THINK YOU SHOULD BE UP TO
4 SPEED.

5 .

6 MR. HALPERN: ABSOLUTELY, YOUR HONOR. IT MAY ONLY
7 BE THE CLASSIFIED NATURE OF THE JENCKS. WE HAVE ALREADY
8 PROVIDED MATERIAL TO THE OFFICE OF GENERAL COUNSEL THAT HAS TO
9 BE REVIEWED. BUT SUBJECT TO THAT --

10 THE COURT: WE MADE THAT DISTINCTION LAST TIME. I
11 THINK MR. MAC DOUGALL UNDERSTANDS THAT. ALL EXCEPT THE
12 CLASSIFIED MATERIAL WILL BE TURNED OVER TO YOU STARTING
13 IMMEDIATELY AND FULL PRODUCTION WITHIN A WEEK AND A HALF.

14 MR. HALPERN: JUST SO THERE'S NO CONFUSION HERE --
15 AND THIS IS PART OF THE PROBLEM THAT MR. WILKES FACES. I
16 WOULD SAY 99 PERCENT OF THE JENCKS WILL BE CLASSIFIED. THAT'S
17 JUST HOW IT IS. THERE WILL SOME THAT'S NOT. AND BECAUSE YOU
18 WANT IT, AS SOON AS THAT CLEARANCE IS IN PLACE, WE'RE READY TO
19 PRODUCE IT.

20 THE COURT: MR. HALPERN, GIVE EVERYTHING YOU CAN
21 EXCEPT THE CLASSIFIED INFORMATION.

22 IS THERE A WAY THAT YOU CAN PRODUCE THE CLASSIFIED
23 JENCKS TO HIS COLLEAGUE WHO ALREADY HAS THE CLEARANCE?

24 MR. HALPERN: ABSOLUTELY.

25 MR. MAC DOUGALL: WE'RE ALL CLEARED TO THE SECRET

1 LEVEL.

2 THE COURT: YOU CAN MAKE ACCOMMODATIONS, THEN,
3 MR. MAC DOUGALL, WITH YOUR COLLEAGUE WHO HAS APPROPRIATE
4 CLEARANCE, AND THEY'LL TURN OVER FOR HIM TO REVIEW WHATEVER IS
5 CLASSIFIED AT THIS POINT.

6 LET ME THEN SET THAT AT THIS POINT AS A FIRM TRIAL
7 DATE ON THE WILKES/FOGGO MATTER.

8 THE TRIAL WILL BEGIN ON THE 23RD OF OCTOBER.

9 NOW, MR. MAC DOUGALL, I PUT TO YOU AND MR. GERAGOS
10 THE SAME QUESTION.

11 YOU WANT AN EARLY IN LIMINE HEARING OR IS IT
12 SUFFICIENT THAT I HEAR IN LIMINE MOTIONS ON THE 22ND, THE
13 MONDAY BEFORE THE TRIAL STARTS?

14 MR. GERAGOS: THE 22ND IS FINE.

15 THE COURT: IS THAT GOOD WITH YOU?

16 MR. MAC DOUGALL: YES.

17 THE COURT: HERE'S WHAT I'M GOING TO ASK YOU TO DO,
18 MR. MAC DOUGALL: I'M GOING TO ASK YOU TO OBSERVE, ON BEHALF
19 OF MR. FOGGO, THE SAME DEADLINE THAT I SET FOR PRESENTING ME
20 WITH ANY SPECIAL REQUESTS AFFECTING THE JURY. I SET THE 16TH
21 OF JULY. IF YOU HAVE IN MIND THE QUESTIONNAIRE OR ANY OTHER
22 OUT-OF-THE-ORDINARY JURY PROCEDURES, YOU'LL FILE YOUR BRIEF
23 WITH ME ON THE 16TH, ON OR BEFORE JULY 16TH.

24 SO MOTIONS IN LIMINE ON MR. FOGGO'S CASE WILL BE
25 HEARD THE 22ND AT 2:00.

1 AND MR. WILKES'S SECOND CASE THE 22ND AT 2:00.

2 TISH, KEEP THAT CALENDAR CLEAR THAT AFTERNOON EXCEPT
3 FOR THOSE MATTERS AS WELL.

4 JURY TRIAL BEGINS FOR MR. WILKES AND MR. FOGGO ON
5 THE 23RD AT 9:00 A.M.

6 ARE THERE ANY OTHER MATTERS THAT I HAVEN'T DECIDED
7 THAT I NEED TO?

8 MR. MAC DOUGALL: NO. I WOULD JUST ASK AND I GUESS
9 FOREWARN YOU THAT IF WE HAVEN'T HEARD ABOUT THE SECURITY
10 CLEARANCES VERY SOON, WE MAY BE BACK IN COURT BECAUSE WE MAY
11 BE RUNNING OUT OF RUNWAY VERY QUICKLY.

12 THE COURT: CALL ME -- YOU'RE AUTHORIZED,
13 NOTWITHSTANDING MY STANDING ORDER IN CRIMINAL CASES, TO CALL
14 ME DIRECTLY. I'LL GET THE REPORTER. WE'LL HAVE AN EX PARTE
15 CONFERENCE. I'LL PROBABLY BRING IN THE COURT SECURITY
16 OFFICER, WHO'S ON TOP OF THAT AND MOVING THAT ALONG.

17 MR. LONDERGAN, WHATEVER YOU CAN DO IN THESE SEVERAL
18 AREAS ABOUT MAKING ACCESS TO THE MATERIAL MORE CONVENIENT AND
19 GETTING THEIR CLEARANCES, I'D APPRECIATE IT.

20 MR. LONDERGAN: YES, YOUR HONOR.

21 THE COURT: ANYTHING ELSE FROM ANYONE?

22 MR. GERAGOS: MY ONLY QUESTION IS I UNDERSTAND THE
23 FIRM TRIAL DATE. I UNDERSTAND THE ORDERS AND EVERYTHING ELSE.

24 BUT WHAT IF WE DON'T HAVE OUR INVESTIGATION DONE AS
25 TO THE LEAKS?

1 THE COURT: WE'LL CROSS THAT BRIDGE WHEN WE COME TO
2 IT. I ASKED MR. FORGE TO HAVE THE PEOPLE CALL ME. I'M GOING
3 TO -- MY PHILOSOPHY IS, MR. GERAGOS, IT'S BETTER NOW TO DEAL
4 WITH A FIRM TRIAL DATE SO THAT WHOEVER CALLS, I CAN SAY,
5 "LOOK, I'VE GOT TRIAL DATES SET, AND YOU NEED TO GET TO THE
6 BOTTOM OF THIS. BECAUSE IF THERE'S ANY EXONERATORY MATERIAL,
7 I NEED TO PRESENT IT TO DEFENSE COUNSEL BEFORE THE FIRST
8 WITNESS IS CALLED." SO I'LL STAY ON TOP OF THAT.

9 MR. FORGE, PLEASE GET AHOOLD OF WHOEVER IT IS AND
10 HAVE THEM CONTACT ME SO I CAN TELL THEM ABOUT THESE DATES.

11 MR. FORGE: I WILL.

12 THE COURT: THANK YOU ALL.

13 WE'RE IN RECESS.

14 --00--

15

16

17 I HEREBY CERTIFY THAT THE TESTIMONY
18 ADDUCED IN THE FOREGOING MATTER IS
19 A TRUE RECORD OF SAID PROCEEDINGS.

20

21

S/EVA OEMICK

5-21-07

22

EVA OEMICK
OFFICIAL COURT REPORTER

DATE

23

24

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COMPUTER-AIDED TRANSCRIPTION